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# ONTARIO LABOUR RELATIONS BOARD REPORTS

July 1987



Ontario

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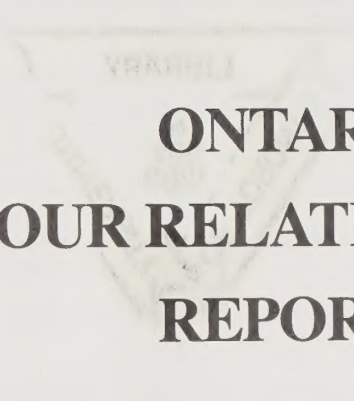
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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1987] OLRB REP. JULY**

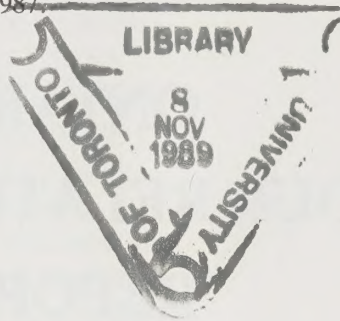
**EDITOR: COLLEEN EDWARDS**

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations Boards  
Reports*, Butterworth & Co., Toronto.

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## NOTICE OF REVISED REGULATIONS

Sections 4, 77, and 91 of R.R.O. 1980, Reg. 546 have been amended by O.Reg. 443/87, which was filed July 31, 1987 and gazetted August 15, 1987.



## CASES REPORTED

1.	Almonte Nursing Home; Re U.F.C.W. ....	945
2.	Armbr Materials and Construction Limited, and L.I.U.N.A., Local 183; Re U.A., Local 599; Re I.U.O.E., Local 793; Re Metropolitan Toronto Sewer and Watermain Contractors Association .....	948
3.	C.E. Jamieson & Co. (Dominion) Limited; Re Kahim Samad; Re E.C.W.U. ....	953
4.	City Cab, ABC Taxi (Brockville) Ltd., and Safedrive Inc., c.o.b. as; Re Mohinder Gill; Re R.W.D.S.U.; Re Group of Employees .....	955
5.	Commonwealth Construction Company, A Division of Guy F. Atkinson Ltd.; Re Ralph Marion et al. ....	961
6.	Construction Association of Thunder Bay Inc., General Contractors' Division of the; Re Lumber and Sawmill Workers' Union, Local 2693 of C.J.A. and L.I.U.N.A., Local 607, and L.I.U.N.A. Ontario Provincial District Council; Re Ontario Provincial Council, C.J.A. ....	976
7.	D'Alessandro, Luciano and Donato Marinaro; Re L.I.U.N.A., Local 1089, and Rocco D'Andrea .....	986
8.	Daniell, John; Re Teamsters' Union .....	990
9.	Easy Enterprises Inc.; Re Charlene Banwait; Re Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847 .....	994
10.	Grey Bruce Regional Health Centre; Re ONA .....	996
11.	Hardrock Forming Company, 270915 Ontario Limited, and 556347 Ontario Limited c.o.b. as, Delform Construction Limited, Ilena Construction Limited; Re The Form Council of Ontario, and L.I.U.N.A., Local 183; Re Carpenters' District Council of Toronto and Vicinity on behalf of Carpenters Local Union 27, C.J.A., The Ironworkers District Council of Ontario, and B.S.O.I.W., Local 721 .....	1003
12.	KBM Forestry Consultants Inc., The Crown in Right of Ontario as represented by the Ministry of Natural Resources and; Re O.P.S.E.U. ....	1007
13.	Liebman, Jean; Re York University Staff Association and York University .....	1011
14.	Oakridge Villa Nursing Home; Re ONA; Re Extendicare Health Services Inc. ....	1026
15.	Peel Board of Education, The; Re O.S.S.T.F. ....	1030
16.	Shaw-Almex Industries Limited; Re U.S.W.A.; Re Group of Employees .....	1032
17.	Sinclair Welding Ltd.; Re L.I.U.N.A., Local 506; Re I.U.O.E., Local 793; Re B.S.O.I.W., Local 721 .....	1033
18.	Walpat Glass & Aluminum Products Ltd. and M & I Aluminum Ltd.; Re P.A.T., Local 1795; Re P.A.T., Local 1819 .....	1049



## SUBJECT INDEX

- Bargaining Rights - Collective Agreement - Construction Industry - Prior Board decision concerning different parties holding that Union could not represent construction labourers in the ICI sector of the construction industry - Applicant seeking declaration that collective agreement with Union unlawful - Analysis of principles of *res judicata* and *in rem* - Prior Board decision is a decision *in rem* - Collective agreement between applicant and Union declared null and void
- CONSTRUCTION ASSOCIATION OF THUNDER BAY INC., GENERAL CONTRACTORS' DIVISION OF THE; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF C.J.A. AND L.I.U.N.A., LOCAL 607, AND L.I.U.N.A. ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL COUNCIL, C.J.A. .... 976
- Bargaining Unit - Certification - Construction Industry - Labourers' Union requesting an "all employee" unit for persons engaged in the erection and finishing of precast concrete products in the ICI sector - Respondent and intervenors requesting that unit be described in terms of "all construction labourers" - Employee bargaining agency designation order referring to "all employees" - Board concluding that the question of the description of a bargaining unit and the wording of the designation are not co-extensive - Board must be sensitive to jurisdictional disputes - Board generally avoiding an all employee unit in the construction industry - Competing jurisdictional claims by intervenors involved in this application - Unit confined to construction labourers
- SINCLAIR WELDING LTD.; RE L.I.U.N.A., LOCAL 506; RE I.U.O.E., LOCAL 793; RE B.S.O.I.W., LOCAL 721..... 1033
- Bargaining Unit - Crown Transfer - Representation Vote - Board declaring KBM to be a successor employer and determining appropriate bargaining unit - Board declining to exercise its discretion to order a representation vote of the employees in the unit because no intermingling of employees and only one union involved
- KBM FORESTRY CONSULTANTS INC., THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND; RE O.P.S.E.U. .... 1007
- Certification - Bargaining Unit - Construction Industry - Labourers' Union requesting an "all employee" unit for persons engaged in the erection and finishing of precast concrete products in the ICI sector - Respondent and intervenors requesting that unit be described in terms of "all construction labourers" - Employee bargaining agency designation order referring to "all employees" - Board concluding that the question of the description of a bargaining unit and the wording of the designation are not co-extensive - Board must be sensitive to jurisdictional disputes - Board generally avoiding an all employee unit in the construction industry - Competing jurisdictional claims by intervenors involved in this application - Unit confined to construction labourers
- SINCLAIR WELDING LTD.; RE L.I.U.N.A., LOCAL 506; RE I.U.O.E., LOCAL 793; RE B.S.O.I.W., LOCAL 721..... 1033
- Certification - Collective Agreement - Employee Reference - Reconsideration - Amendment of certificate sought via reconsideration to exclude position of secretary/clerk - Bargaining unit description in certificate was an agreed-upon one - Since certificate parties have entered into collective agreement - Board will not vary the terms of a certificate once the parties have entered into a collective agreement - Board having jurisdiction to determine whether a

## II

person is an employee but jurisdiction exercised only in accordance with *Westmount Hospital* - Request for reconsideration denied

ALMONTE NURSING HOME; RE U.F.C.W. .... 945

Certification - Pre-Hearing Vote - Applicant requesting pre-hearing vote but also requesting that the appropriate unit be determined before any vote conducted - Board not having jurisdiction to conduct mid-hearing representation votes - Applicant abandoning its request for a pre-vote hearing - Voting arrangements detailed

PEEL BOARD OF EDUCATION, THE; RE O.S.S.T.F. .... 1030

Change in Working Conditions - Collective Agreement - Conciliation - Duty to Bargain in Good Faith - Reference - Unfair Labour Practice - Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer - Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector - Employer unable to rely on ostensible authority of negotiating committee - Document null and void as a collective agreement - Employer breaching duty to bargain in good faith by signing agreement - Breach of freeze by implementing employment terms not agreed to by union - Minister having authority to appoint a conciliation officer

OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. .... 1026

Collective Agreement - Bargaining Rights - Construction Industry - Prior Board decision concerning different parties holding that Union could not represent construction labourers in the ICI sector of the construction industry - Applicant seeking declaration that collective agreement with Union unlawful - Analysis of principles of *res judicata* and *in rem* - Prior Board decision is a decision *in rem* - Collective agreement between applicant and Union declared null and void

CONSTRUCTION ASSOCIATION OF THUNDER BAY INC., GENERAL CONTRACTORS' DIVISION OF THE; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF C.J.A. AND L.I.U.N.A., LOCAL 607, AND L.I.U.N.A. ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL COUNCIL, C.J.A. .... 976

Collective Agreement - Certification - Employee Reference - Reconsideration - Amendment of certificate sought via reconsideration to exclude position of secretary/clerk - Bargaining unit description in certificate was an agreed-upon one - Since certificate parties have entered into collective agreement - Board will not vary the terms of a certificate once the parties have entered into a collective agreement - Board having jurisdiction to determine whether a person is an employee but jurisdiction exercised only in accordance with *Westmount Hospital* - Request for reconsideration denied

ALMONTE NURSING HOME; RE U.F.C.W. .... 945

Collective Agreement - Change in Working Conditions - Conciliation - Duty to Bargain in Good Faith - Reference - Unfair Labour Practice - Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer - Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector - Employer unable to rely on ostensible authority of negotiating committee - Document null and void as a collective agreement - Employer breaching duty to bargain in good faith by signing agreement - Breach of freeze by implementing employment terms not agreed to by union - Minister having authority to appoint a conciliation officer

OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. .... 1026

- Conciliation - Change in Working Conditions - Collective Agreement - Duty to Bargain in Good Faith - Reference - Unfair Labour Practice - Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer - Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector - Employer unable to rely on ostensible authority of negotiating committee - Document null and void as a collective agreement - Employer breaching duty to bargain in good faith by signing agreement - Breach of freeze by implementing employment terms not agreed to by union - Minister having authority to appoint a conciliation officer
- OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. .... 1026
- Construction Industry - Bargaining Rights - Collective Agreement - Prior Board decision concerning different parties holding that Union could not represent construction labourers in the ICI sector of the construction industry - Applicant seeking declaration that collective agreement with Union unlawful - Analysis of principles of *res judicata* and *in rem* - Prior Board decision is a decision *in rem* - Collective agreement between applicant and Union declared null and void
- CONSTRUCTION ASSOCIATION OF THUNDER BAY INC., GENERAL CONTRACTORS' DIVISION OF THE; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF C.J.A. AND L.I.U.N.A., LOCAL 607, AND L.I.U.N.A. ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL COUNCIL, C.J.A. .... 976
- Construction Industry - Bargaining Unit - Certification - Labourers' Union requesting an "all employee" unit for persons engaged in the erection and finishing of precast concrete products in the ICI sector - Respondent and intervenors requesting that unit be described in terms of "all construction labourers" - Employee bargaining agency designation order referring to "all employees" - Board concluding that the question of the description of a bargaining unit and the wording of the designation are not co-extensive - Board must be sensitive to jurisdictional disputes - Board generally avoiding an all employee unit in the construction industry - Competing jurisdictional claims by intervenors involved in this application - Unit confined to construction labourers
- SINCLAIR WELDING LTD.; RE L.I.U.N.A., LOCAL 506; RE I.U.O.E., LOCAL 793; RE B.S.O.I.W., LOCAL 721..... 1033
- Construction Industry Grievance - Practice and Procedure - Principals of respondents failing to appear at hearing although given notice and properly subpoenaed - Board issuing Sheriff's warrant for their arrest - Board authority to issue arrest warrants reviewed
- WALPAT GLASS & ALUMINUM PRODUCTS LTD. AND M & I ALUMINUM LTD.; RE P.A.T., LOCAL 1795; RE P.A.T., LOCAL 1819 ..... 1049
- Crown Transfer - Bargaining Unit - Representation Vote - Board declaring KBM to be a successor employer and determining appropriate bargaining unit - Board declining to exercise its discretion to order a representation vote of the employees in the unit because no intermingling of employees and only one union involved
- KBM FORESTRY CONSULTANTS INC., THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND; RE O.P.S.E.U. .... 1007
- Damages - Practice and Procedure - Unfair Labour Practice - Respondent's business records voluminous - Inappropriate for Board to direct respondent to move the documents away from its premises to allow the complainant to inspect them for purpose of assessment of damages

#### IV

- Amount of wages and benefits paid to employees working as strike replacements considered relevant to the assessment of damages	
SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES.....	1032
Discharge - Health and Safety - Complainants alleging that respondent discharged them to prevent them from raising further safety problems - Employer maintaining the discharges resulted from the complainants disrupting the workplace and refusing to do their regular work - Complainants were not authorized health and safety representatives but were doing safety inspections on company time - OHSA not authorizing employees to act as self-appointed safety representatives - Employees not terminated because they were exercising rights under OHSA - Five-day suspension substituted for two of three discharges	
COMMONWEALTH CONSTRUCTION COMPANY, A DIVISION OF GUY F. ATKINSON LTD.; RE RALPH MARION ET AL.....	961
Duty of Fair Referral - Duty of Fair Representation - Remedies - Unfair Labour Practice - Union paying legal fees incurred by respondent in Board proceedings but not those of complainants - No breach of fair representation duty - Board having no jurisdiction to act as watchdog over internal union processes - No circumstances to warrant departure from policy of declining to award costs - Hearings protracted by both parties - Complainants' mixed success also militating against an award of costs	
D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE L.I.U.N.A., LOCAL 1089, AND ROCCO D'ANDREA.....	986
Duty of Fair Representation - Duty of Fair Referral - Remedies - Unfair Labour Practice - Union paying legal fees incurred by respondent in Board proceedings but not those of complainants - No breach of fair representation duty - Board having no jurisdiction to act as watchdog over internal union processes - No circumstances to warrant departure from policy of declining to award costs - Hearings protracted by both parties - Complainants' mixed success also militating against an award of costs	
D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE L.I.U.N.A., LOCAL 1089, AND ROCCO D'ANDREA.....	986
Duty of Fair Representation - Unfair Labour Practice - Earlier s.68 complaint resulting in Board directing that grievance be reinstated and rescheduled for arbitration - Board indicating in earlier decision that union had a right to settle the grievance prior to arbitration - Executive Board of union accepting a settlement that was unacceptable to the complainant - No breach of fair representation duty	
LEIBMAN, JEAN; RE YORK UNIVERSITY STAFF ASSOCIATION AND YORK UNIVERSITY.....	1011
Duty of Fair Representation - Unfair Labour Practice - Union implementing a pension plan over the objections of most of the employees who would be covered by the plan - Union entitled to adopt a course of action other than that favoured by most employees once views of employees taken into account - Reasonable for union to conclude that long-run interests of bargaining unit members as a whole would benefit from the introduction of a pension plan - No breach of fair representation duty	
DANIELL, JOHN; RE TEAMSTERS' UNION.....	990
Duty to Bargain in Good Faith - Change in Working Conditions - Collective Agreement - Conciliation - Reference - Unfair Labour Practice - Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer - Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector - Employer unable to rely	

on ostensible authority of negotiating committee - Document null and void as a collective agreement - Employer breaching duty to bargain in good faith by signing agreement - Breach of freeze by implementing employment terms not agreed to by union - Minister having authority to appoint a conciliation officer

OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. .... 1026

Employee Reference - Certification - Collective Agreement - Reconsideration - Amendment of certificate sought via reconsideration to exclude position of secretary/clerk - Bargaining unit description in certificate was an agreed-upon one - Since certificate parties have entered into collective agreement - Board will not vary the terms of a certificate once the parties have entered into a collective agreement - Board having jurisdiction to determine whether a person is an employee but jurisdiction exercised only in accordance with *Westmount Hospital* - Request for reconsideration denied

ALMONTE NURSING HOME; RE U.F.C.W. .... 945

Employee Reference - Practice and Procedure - Whether nurse clinicians in hospital excluded from unit by s.1(3)(b) - Application date in January and officer's inquiry in September and December - Passage of time not warranting departure from Board practice of determining duties and responsibilities as of application date - Management style in health care field reviewed - Nurse clinicians not employed in a confidential capacity nor exercising managerial functions

GREY BRUCE REGIONAL HEALTH CENTRE; RE ONA ..... 996

Evidence - Jurisdictional Dispute - Sector Determination - Whether Board should hear evidence of area practice in making sectoral determination under s.150 - Legislature never intended to introduce concept of area practice or geographic area into sectoral determination - Labour relations best served by not making distinctions among the trades in sectoral determinations - Further hearing set to hear evidence of the work characteristics of the work in dispute

ARMBRO MATERIALS AND CONSTRUCTION LIMITED, AND L.I.U.N.A., LOCAL 183; RE U.A., LOCAL 599; RE I.U.O.E., LOCAL 793; RE METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION ..... 948

Fraud - Termination - Applicants alleging that employees intimidated into signing membership cards during organizing drive - Allegations not constituting fraud - Meaning of fraud should not be expanded to include charges which can be filed under other sections of the Act - Application dismissed

EASY ENTERPRISES INC.; RE CHARLENE BANWAIT; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, TEAMSTERS UNION LOCAL 847 ..... 994

Health and Safety - Discharge - Complainants alleging that respondent discharged them to prevent them from raising further safety problems - Employer maintaining the discharges resulted from the complainants disrupting the workplace and refusing to do their regular work - Complainants were not authorized health and safety representatives but were doing safety inspections on company time - OHSA not authorizing employees to act as self-appointed safety representatives - Employees not terminated because they were exercising rights under OHSA - Five-day suspension substituted for two of three discharges

COMMONWEALTH CONSTRUCTION COMPANY, A DIVISION OF GUY F. ATKINSON LTD.; RE RALPH MARION ET AL..... 961

Jurisdictional Dispute - Evidence - Sector Determination - Whether Board should hear evidence of area practice in making sectoral determination under s.150 - Legislature never intended

to introduce concept of area practice or geographic area into sectoral determination - Labour relations best served by not making distinctions among the trades in sectoral determinations - Further hearing set to hear evidence of the work characteristics of the work in dispute	
ARMBRO MATERIALS AND CONSTRUCTION LIMITED, AND L.I.U.N.A., LOCAL 183; RE U.A., LOCAL 599; RE I.U.O.E., LOCAL 793; RE METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION .....	948
Practice and Procedure - Construction Industry Grievance - Principals of respondents failing to appear at hearing although given notice and properly subpoenaed - Board issuing Sheriff's warrant for their arrest - Board's authority to issue arrest warrants reviewed	
WALPAT GLASS & ALUMINUM PRODUCTS LTD. AND M & I ALUMINUM LTD.; RE P.A.T., LOCAL 1795; RE P.A.T., LOCAL 1819 .....	1049
Practice and Procedure - Damages - Unfair Labour Practice - Respondent's business records voluminous - Inappropriate for Board to direct respondent to move the documents away from its premises to allow the complainant to inspect them for purpose of assessment of damages - Amount of wages and benefits paid to employees working as strike replacements considered relevant to the assessment of damages	
SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES .....	1032
Practice and Procedure - Employee Reference - Whether nurse clinicians in hospital excluded from unit by s.1(3)(b) - Application date in January and officer's inquiry in September and December - Passage of time not warranting departure from Board practice of determining duties and responsibilities as of application date - Management style in health care field reviewed - Nurse clinicians not employed in a confidential capacity nor exercising managerial functions	
GREY BRUCE REGIONAL HEALTH CENTRE; RE ONA .....	996
Pre-Hearing Vote - Certification - Applicant requesting pre-hearing vote but also requesting that the appropriate unit be determined before any vote conducted - Board not having jurisdiction to conduct mid-hearing representation votes - Applicant abandoning its request for a pre-vote hearing - Voting arrangements detailed	
PEEL BOARD OF EDUCATION, THE; RE O.S.S.T.F. ....	1030
Reconsideration - Certification - Collective Agreement - Employee Reference - Amendment of certificate sought via reconsideration to exclude position of secretary/clerk - Bargaining unit description in certificate was an agreed-upon one - Since certificate parties have entered into collective agreement - Board will not vary the terms of a certificate once the parties have entered into a collective agreement - Board having jurisdiction to determine whether a person is an employee but jurisdiction exercised only in accordance with <i>Westmount Hospital</i> - Request for reconsideration denied	
ALMONTE NURSING HOME; RE U.F.C.W. ....	945
Reference - Change in Working Condition - Collective Agreement - Conciliation - Duty to Bargain in Good Faith - Unfair Labour Practice - Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer - Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector - Employer unable to rely on ostensible authority of negotiating committee - Document null and void as a collective agreement - Employer breaching duty to bargain in good faith by signing agreement -	

Breach of freeze by implementing employment terms not agreed to by union - Minister having authority to appoint a conciliation officer

OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. .... 1026

Related Employer - Effect of related employer declaration would be to create jurisdictional dispute - Combined entity would become bound by conflicting collective agreements with two unions involving the same work - Board reluctant to make a "related employer" declaration when the effect is to create a conflict with established bargaining rights held by another union - Section 1(4) declaration not warranted

HARDROCK FORMING COMPANY, 270915 ONTARIO LIMITED, AND 556347 ONTARIO LIMITED C.O.B. AS, DELFORM CONSTRUCTION LIMITED, ILENA CONSTRUCTION LIMITED; RE THE FORM COUNCIL OF ONTARIO, AND L.I.U.N.A., LOCAL 183; RE CARPENTERS' DISTRICT COUNCIL OF TORONTO AND VICINITY ON BEHALF OF CARPENTERS LOCAL UNION 27, C.J.A., THE IRONWORKERS DISTRICT COUNCIL OF ONTARIO, AND B.S.O.I.W., LOCAL 721 ..... 1003

Remedies - Duty of Fair Referral - Duty of Fair Representation - Unfair Labour Practice - Union paying legal fees incurred by respondent in Board proceedings but not those of complainants - No breach of fair representation duty - Board having no jurisdiction to act as watchdog over internal union processes - No circumstances to warrant departure from policy of declining to award costs - Hearings protracted by both parties - Complainants' mixed success also militating against an award of costs

D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE L.I.U.N.A., LOCAL 1089, AND ROCCO D'ANDREA ..... 986

Representation Vote - Bargaining Unit - Crown Transfer - Board declaring KBM to be a successor employer and determining appropriate bargaining unit - Board declining to exercise its discretion to order a representation vote of the employees in the unit because no intermingling of employees and only one union involved

KBM FORESTRY CONSULTANTS INC., THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND; RE O.P.S.E.U. .... 1007

Representation Vote - Termination - Two employees listed on employee list as being part-time - Employer cannot later resile from this representation that the employees were not eligible to vote in the full-time unit - Union alleging that employer represented to the union outside the proceedings that two other employees were not in the unit - Conduct of employer in the workplace in relation to these employees not affecting eligibility to vote - These two ballots counted

C.E. JAMIESON & CO. (DOMINION) LIMITED; RE HAKIM SAMAD; RE E.C.W.U. .... 953

Sector Determination - Evidence - Jurisdictional Dispute - Whether Board should hear evidence of area practice in making sectoral determination under s.150 - Legislature never intended to introduce concept of area practice or geographic area into sectoral determination - Labour relations best served by not making distinctions among the trades in sectoral determinations - Further hearing set to hear evidence of the work characteristics of the work in dispute

ARMBRO MATERIALS AND CONSTRUCTION LIMITED, AND L.I.U.N.A., LOCAL 183; RE U.A., LOCAL 599; RE I.U.O.E., LOCAL 793; RE METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION ..... 948

## VIII

Termination - Fraud - Applicants alleging that employees intimidated into signing membership cards during organizing drive - Allegations not constituting fraud - Meaning of fraud should not be expanded to include charges which can be filed under other sections of the Act - Application dismissed  EASY ENTERPRISES INC.; RE CHARLENE BANWAIT; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, TEAMSTERS LOCAL 847 .....	994
Termination - Notice to bargain sent outside sixty-day period set out in Act - Numerous unfair labour practice complaints filed by union - Collective bargaining proposals difficult to develop in taxi industry - Haste in filing application a relevant factor - Whether Board should consider conduct following the date on which the termination application was filed - Application dismissed  CITY CAB, ABC TAXI (BROCKVILLE) LTD., AND SAFEDRIVE INC., C.O.B. AS; RE MOHINDER GILL; RE R.W.D.S.U.; RE GROUP OF EMPLOYEES .....	955
Termination - Representation Vote - Two employees listed on employee list as being part-time - Employer cannot later resile from this representation that the employees were not eligible to vote in the full-time unit - Union alleging that employer represented to the union outside the proceedings that two other employees were not in the unit - Conduct of employer in the workplace in relation to these employees not affecting eligibility to vote - These two ballots counted  C.E. JAMIESON & CO. (DOMINION) LIMITED; RE HAKIM SAMAD; RE E.C.W.U. ....	953
Unfair Labour Practice - Change in Working Conditions - Collective Agreement - Conciliation - Duty to Bargain in Good Faith - Reference - Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer - Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector - Employer unable to rely on ostensible authority of negotiating committee - Document null and void as a collective agreement - Employer breaching duty to bargain in good faith by signing agreement - Breach of freeze by implementing employment terms not agreed to by union - Minister having authority to appoint a conciliation officer  OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. ....	1026
Unfair Labour Practice - Damages - Practice and Procedure - Respondent's business records voluminous - Inappropriate for Board to direct respondent to move the documents away from its premises to allow the complainant to inspect them for purpose of assessment of damages - Amount of wages and benefits paid to employees working as strike replacements considered relevant to the assessment of damages  SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES .....	1032
Unfair Labour Practice - Duty of Fair Referral - Duty of Fair Representation - Remedies - Union paying legal fees incurred by respondent in Board proceedings but not those of complainants - No breach of fair representation duty - Board having no jurisdiction to act as watchdog over internal union processes - No circumstances to warrant departure from policy of declining to award costs - Hearings protracted by both parties - Complainants' mixed success also militating against an award of costs  D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE L.I.U.N.A., LOCAL 1089, AND ROCCO D'ANDREA .....	986

Unfair Labour Practice - Duty of Fair Representation - Earlier s.68 complaint resulting in Board directing that grievance be reinstated and rescheduled for arbitration - Board indicating in earlier decision that union had a right to settle the grievance prior to arbitration - Executive Board of union accepting a settlement that was unacceptable to the complainant - No breach of fair representation duty	
LIEBMAN, JEAN; RE YORK UNIVERSITY STAFF ASSOCIATION AND YORK UNIVERSITY.....	1011
Unfair Labour Practice - Duty of Fair Representation - Union implementing a pension plan over the objections of most of the employees who would be covered by the plan - Union entitled to adopt a course of action other than that favoured by most employees once views of employees taken into account - Reasonable for union to conclude that long-run interests of bargaining unit members as a whole would benefit from the introduction of a pension plan - No breach of fair representation duty	
DANIELL, JOHN; RE TEAMSTERS' UNION.....	990



**1625-85-R United Food and Commercial Workers International Union, Applicant  
v. Almonte Nursing Home, Respondent**

**Certification - Collective Agreement - Employee Reference - Reconsideration - Amendment of certificate sought via reconsideration to exclude position of secretary/clerk - Bargaining unit description in certificate was an agreed-upon one - Since certificate parties have entered into collective agreement - Board will not vary the terms of a certificate once the parties have entered into a collective agreement - Board having jurisdiction to determine whether a person is an employee but jurisdiction exercised only in accordance with *Westmount Hospital* - Request for reconsideration denied**

**BEFORE:** *M. G. Mitchnick*, Vice-Chair, and Board Members *F. W. Murray* and *B. L. Armstrong*.

**DECISION OF THE BOARD;** July 29, 1987

1. This is an application filed by the employer under the provisions of section 106(1) of the *Labour Relations Act*, asking the Board to reconsider and amend a certificate issued by it on October 18, 1985. Section 106(1) provides:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

2. The variation now sought is specific exclusion from the bargaining unit of the position of “secretary/clerk”, whom the employer asserts is a member of management. The bargaining-unit description in the certificate itself was an agreed-upon one, coming to the Board by way of the “waiver-of-hearing” process. The employer points out that, while it agreed to the bargaining-unit description ultimately contained in the certificate, the position of “secretary/clerk” was left off the Schedule of employees it filed with the Board entirely, and that the position has always in fact been treated as an excluded one. From these assertions, we take the employer to be saying that it does not and did not consider the “secretary/clerk” to be someone who would be included in an “all-employee” description of a bargaining unit, and that that description ought now to be varied by the Board to more accurately reflect that exclusion.

3. The employer does not deny the trade union’s assertion that the parties have, since the certificate, entered into a collective agreement to cover the bargaining unit in question. That is a fact of some significance, because it has always been the position of this Board that it will not reconsider a certificate or vary its terms once the parties have entered into a collective agreement. The rationale for this is that once a collective agreement is entered into, the certificate ceases to be the controlling document in defining the scope of the bargaining rights held by the trade union. As it was put by Chief Justice Laskin in *Terra Nova Motor Inn Ltd.*, 74 CLLC ¶14,253: “once a collective agreement is negotiated, the certificate has served its purpose and is, for all practical purposes, spent”. See *Gilbarco Canada Ltd.*, [1971] OLRB Rep. March 155; *Public Service Alliance of Canada*, [1987] OLRB Rep. Feb. 265. The bargaining unit is defined from that point by the collective agreement, and any question of exclusion from the coverage of the collective agreement is a matter for negotiation (or arbitration) between the parties.

4. That question, it should be noted however, is distinct from the question of whether an

individual occupying a particular position is an “employee” for the purposes of the *Labour Relations Act*. Most frequently material in that regard is section 1(3)(b) of the Act, which provides:

(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee ...

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

As the Board attempted to explain and separate these two issues in, for example, *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500:

2. Once a collective agreement has been entered into, a subsequent dispute as to whether or not a particular person is a member of the bargaining unit often involves two questions. The first question is whether the person is an “employee” within the meaning of *The Labour Relations Act*. That is the only question to which the Board addresses itself under section 95(2), and usually involves an assessment of whether the person “exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations”, within the meaning of section 1(3)(b) of the Act. It is, unfortunately, not as clear as it might be whether this is a question which, in the context of a collective agreement, can only be brought before the Ontario Labour Relations Board for determination. See *Canadian Industries Ltd.*, [1972] 3 O.R. 63; *Re Miller et al and Algoma Steelworkers Credit Union*, 75 CLLC ¶14,289; *Re General Concrete*, (1978), 22 O.R. (2d) 65. In any event, if it is determined that the person is an “employee” within the meaning of *The Labour Relations Act*, the second (and ultimate) question is whether the person is covered by the collective agreement itself, having regard to the language of the “Scope” clause and any factors relevant to its interpretation. That question may be determined by the parties pursuant to the grievance and arbitration provisions of the collective agreement. It might be further noted, as an incidental matter, that once a collective agreement is entered into, the Board itself (in normal circumstances) considers the effect of its own certificate to have been “spent”, in the sense that it is the language of the collective agreement negotiated by the parties which then governs as to the extent of the bargaining unit currently represented by the trade union. See *Gilbarco Canada Ltd.*, [1971] OLRB Rep. March 155.

Section 106(2) [previously 95(2)] of the Act itself provides:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

If the Board finds the person *not* to be an “employee” for the purposes of the Act, it does not matter whether the person appears on the face of a collective agreement to fall within its scope or not: a person who is not an “employee” for the purposes of the Act cannot be represented by a trade union in collective bargaining under that Act, nor covered by a “collective agreement” as that term is defined by the Act. See, e.g., *Northern Telecom*, [1983] OLRB Rep. Jan. 95.

5. However, in interpreting and applying section 106(2) of the *Labour Relations Act*, the Board has adopted certain estoppel-like principles which bring a measure of stability to a given collective-bargaining relationship over the issue of inclusions or exclusions, and which the Board summarized in another decision of October 1980, *Westmount Hospital*, reported at page 1572 of the monthly reports:

1. This is an application under section 95(2) of *The Labour Relations Act*, requesting the Board to determine whether the Head Nurses employed at the applicant hospital are “employees” within the meaning of the Act.

2. The respondent Ontario Nurses’ Association asks the Board to dismiss the application on the ground that the Head Nurses have already been determined, by a decision of the Board dated

February 3, 1976, to be “employees” within the meaning of the Act. The respondent takes the position therefore that the issue is *res judicata*.

3. The Board does apply a doctrine analogous to *res judicata* to situations of this kind. See *Central Park Lodges*, Board File No. 2049-79-M, released March 12, 1980. That doctrine does not, however, preclude a fresh application where the duties and responsibilities have changed in a material way from those before the Board in its prior determination. That is precisely what is alleged by the applicant in the present case. The Board would, therefore, normally appoint a Labour Relations Officer limited to inquiring into the changes in duties and responsibilities since the date of the prior application.

4. The parties, however, are currently bound by the collective agreement entered into on May 12, 1980. Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a “question” exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18). Nor will it permit a full application to be brought during the term of a collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer to inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560). If the applicant feels that the appointment should not be limited to “changes”, it may write to the Board setting out its reasons, and the Board may hold a hearing to deal with the proper terms of the appointment.

6. To summarize, the Board does not, as the applicant has requested, exercise its jurisdiction under section 106(1) of the Act for the purpose of varying a certificate it has issued, particularly once a collective agreement has been entered into by the parties to that collective-bargaining relationship. The Board does, however, retain the jurisdiction under section 106(2) to determine questions which may “arise” as to whether a person is in any event an “employee” for the purposes of the Act, but that jurisdiction is exercised in accordance with the principles set out in *Westmount Hospital*, *supra*.

7. The request by the employer for the Board to reconsider and vary the terms of the certificate issued by it on October 18, 1985, is accordingly denied.

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**0477-85-JD** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599, Complainant v. **Armbro Materials and Construction Limited**, and Labourers' International Union of North America, Local 183, Respondents v. International Union of Operating Engineers, Local 793, Intervener #1 v. Metropolitan Toronto Sewer and Watermain Contractors Association, Intervener #2

**Evidence - Jurisdictional Dispute - Sector Determination - Whether Board should hear evidence of area practice in making sectoral determination under section 150 - Legislature never intended to introduce concept of area practice or geographic area into sectoral determination - Labour relations best served by not making distinctions among the trades in sectoral determinations - Further hearing set to hear evidence of the work characteristics of the work in dispute**

**BEFORE:** *R. A. Furness*, Vice-Chair, and Board Members *R. Montague* and *D. Wozniak*.

**APPEARANCES:** *L. C. Arnold* and *C. Carter* for the complainant; *Bruce Binning* and *Dan Fryzuk* for *Armbro Materials and Construction Limited*; *A. M. Minsky*, Q.C. for Labourers' International Union of North America, Local 183; no one for intervener #1; *Richard J. Charney* for intervener #2.

**DECISION OF THE BOARD;** July 29, 1987

1. This is a complaint which has been filed under the provisions of section 91 of the *Labour Relations Act* in which the complainant requests the Board to make a direction with respect to work which the complainant has described as:

The installation of site services at the Honda plant building project at Alliston, Ontario, from the property line to the building line, including, but not limited to, all work required on the project in connection with off-loading and placing in position of piping materials and pre-fabricated manholes, piping, piping layout, preparation of bedding in trench, laying and joining of pipe, installation of pre-fabricated manholes, backfilling to two feet above installed pipe, and all manual work in connection with trenching and backfilling including compacting.

hereinafter referred to as the "project".

2. This complaint was filed on May 25, 1985. A pre-hearing conference was held before a Vice-Chair of the Board on July 24, 1985, and on two occasions thereafter. Subsequently, this complaint was listed for hearing on March 13, 1986. The purpose of the hearing was to consider the evidence and representations of the parties with respect to all matters arising out of and incidental to the complaint regarding the assignment of work. The decision of the Board was released on May 14, 1986. This complaint was again listed for hearing before the present panel on May 19, 1987.

3. In the decision dated May 14, 1986, the Board permitted intervener #2 to intervene in this complaint. See *Armbro Materials and Construction Limited*, [1986] OLRB Rep. May 579. A second issue before the Board had reference to area practice. It was the position of the complainant that the relevant area practice to be considered in the hearing on the merits of this complaint is the practice in the Board's geographic area #18 with respect to the installation of site services on industrial, commercial and institutional projects and that no limit should be placed on how far back in time such evidence may go. The Labourers' International Union of North America, Local 183 ("Local 183") adopted the position that the work in dispute is sewer and watermain work and sought to rely on area practice in respect of such work without regard to whether it was performed

in connection with a residential project, a road, an industrial plant, or an electrical power system project. It was the position of Local 183 that the sewers and watermain sector cuts across the other sectors listed in section 117(e) of the Act and that the work in that sector is defined by the tasks associated with sewer and watermain construction and not by the location in which it is being constructed. A third issue before the Board was whether Armbro Materials and Construction Limited ("Armbro") and Local 183 have a collective agreement applicable to the project. It was the position of the complainant that the collective agreement observed by Armbro and Local 183 on the project is a sewers and watermain collective agreement which has no application to the project because the entire project, including the work in dispute is within the industrial, commercial and institutional sector and can only be covered by a collective agreement in the industrial, commercial and institutional sector. It was the position of Armbro and Local 183 that the work in dispute is within the sewers and watermain sector and that the collective agreement observed by Armbro and Local 183 applied to the work in dispute.

4. It was the position of Armbro and Local 183 that the second and third issues raised matters which required a determination as to whether work performed at the project is within the industrial, commercial and institutional sector of the construction industry under section 150 of the Act. Armbro and Local 183 sought to have the Board defer the hearing of the merits of this complaint pending a determination of the sectoral issue. In its decision dated May 14, 1986, the Board concluded that the issue of whether the work in dispute is within the industrial, commercial and institutional sector should be determined under section 150 before the determination of any other issues which are relevant to this complaint. The Board also decided that a determination under section 150 need not be made the subject matter of a separate proceeding. The Board concluded its decision by stating at pages 582-583 as follows:

10. ...The matter will be relisted for hearing for the purpose of entertaining evidence and representations with respect to a determination under section 150 concerning whether or not the installation of site services at the Honda plant building project at Alliston, Ontario, from the property line to the building line, is within the industrial, commercial and institutional sector of the construction industry. For that aspect of the proceedings, in addition to the existing parties, any trade union, council of trade unions, employer, or employer's organization having a direct connection with the project will have standing to participate. A Board Officer is hereby authorized to meet with the parties to assist them in identifying the parties which will have standing to participate in that aspect of the proceedings, and to report to the Board on the extent of agreement or disagreement respecting that matter. (See *Ellis-Don Limited*, [1985] OLRB Rep. Aug. 1204.)

11. Once the issue of whether the work falls within the ICI sector has been determined, the matter will be listed for a further pre-hearing conference, if that is felt to be advisable by the parties or the Board, or listed for hearing to deal with any outstanding issues pertaining to Local 599's complaint under section 91 of the Act. For that aspect of the proceedings, only the present parties will have standing to participate, unless otherwise determined by the panel of the Board hearing that aspect of the case.

12. This matter is referred to the Registrar for the appointment of the Board Officer, for the purpose described in paragraph 10 of this decision, and for the subsequent relisting for hearing for the purpose of entertaining evidence and representations with respect to a determination of whether or not site service installation work from the property line to the building line at the Honda plant building project at Alliston, Ontario, is within the industrial, commercial and institutional sector of the construction industry. Notices of hearing are to be sent to all trade unions, council of trade unions, employer, and employers' organizations which are agreed by the parties or found by the Board to have a direct connection with that project.

5. In this portion of the complaint, the Board has been asked under section 150 of the Act to determine whether the work on the project falls within the industrial, commercial and institutional sector of the construction industry. Section 150 provides:

The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

Section 117(e) of the Act further provides:

- (e) "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector;

[emphasis added]

Before inquiring into the merits of this application under section 150, the Board entertained representations on a preliminary matter concerning the interrelationship of these two sections.

6. In the course of addressing arguments to the Board, counsel referred extensively to a series of cases where the issue of determination under section 150 or the application of section 117(e) had been considered. The Board was referred to *The Heavy Construction Association of Toronto*, [1973] OLRB Rep. May 245; *Ecodyne Limited*, [1979] OLRB Rep. July 629; *West York Construction Ltd.*, [1983] OLRB Rep. Dec. 2132; *Sword Contracting Limited*, [1985] OLRB Rep. May 743; *Metropolitan Toronto Sewer and Watermain Contractors Association*, [1986] OLRB Rep. Oct. 1362 and *Steen Contractors Limited*, [1987] OLRB Rep. Jan. 137.

7. The complainant argued that in making the determination under section 150, the Board ought to hear evidence of area practice and relied on *West York Construction Ltd.* and adopted the position that the approach to work characteristics in *The Heavy Construction Association of Toronto* was confusing. The complainant emphasized that the key to a determination under section 150 was to ascertain how the trade unions on a project have treated the project in terms of area practice. It was also argued by the complainant that the decision of the Board in *Metropolitan Toronto Sewer and Watermain Contractors Association* that the Board would consider "employers of employees for whom the respondent has bargaining rights in Board area #8 in the sewers and watermains sector who are performing the following work in Board area #8 to be doing work coming within the unit of employers found by the Board to be appropriate for collective bargaining: The installation of main and/or lateral sewers and their appurtenances for the collection and transportation of sewage and storm water and main and/or lateral watermains and their appurtenances for the supply of water, whether installed in conjunction with any other works or services, along public roads, casements or allowances or within private property lines up to three feet of any building or structure, regardless of the ultimate use of the private property" should be confined to the Board's geographic area #8. The complainant urged the Board to treat that decision as being of limited value because it is a decision without reasons.

8. The other parties who were present at the hearing argued against the position taken by the complainant. It was strongly argued that the issue of local area practice was irrelevant in this complaint. The other parties relied upon the decision of the Board in *Metropolitan Toronto Sewer and Watermain Contractors Association* that sewers and watermains work include work done in the public sphere as well as work done within private property up to three feet of any building or structure, regardless of the ultimate use of the private property. It was argued that the ultimate use of the private property ought not to determine whether the work in issue was in the sewers and watermains sector or the industrial, commercial and institutional sector of the construction industry. It was also argued that even though the decision in *Metropolitan Toronto Sewer and Watermain Contractors Association* refers specifically to the Board's geographic area #8, sectoral determina-

tions should not vary either by geographic area or by trade as was referred to by the Board in *Steen Contractors Limited* because this would lead to different sectors for different trades on the same job. It was strongly argued that a definition of a particular project as falling within a particular sector should apply across the province. Reference was made to the definition of sector in the Act and to the fact that sector was not defined neutrally and was defined by reference to work characteristics. The remarks of the Board on work characteristics in *The Heavy Construction Association of Toronto* were understood by the other parties and it was pointed out that the only one of these work characteristics referred to by the Board in *West York Construction Ltd.* was the work characteristic of employee relations. In an analysis of *West York Construction Ltd.* it was pointed out that there was not a single reference to the words “as determined by work characteristics” which appear in the definition of sector in section 117(e) of the Act in the course of the Board’s decision on the sectoral determination.

9. The definition of sector in section 117(e) refers to “a division of the construction industry as determined by work characteristics”. There is no reference to “area practice” or “geographic area” in section 117(e). The term “area practice” is a concept which has been borrowed from among the criteria used by the Board in making a direction in a jurisdictional dispute under section 91 of the Act. The term “geographic area” has been imported from the certification and accreditation sections of the construction industry provisions of the Act. Reference is made to sections 119(1) and 126. The term “geographic area” in those sections is used in connection with the determination by the Board of the appropriate bargaining unit or the appropriate unit of employers. In the view of this panel the resolution of jurisdictional disputes and the determination of appropriate bargaining units or appropriate units of employers has nothing to do with a determination under section 150 in the light of the definition of sector set forth in section 117(e).

10. In *The Heavy Construction Association of Toronto*, [1973] OLRB Rep. May 245, the Board stated at page 249:

14. An examination of the enumerated sectors in clause (e) of section 106 [now 117] leads to the conclusion that for all but one of the sectors listed the names given to these divisions of the construction industry relate to the use which is ultimately made of the construction. At first this may appear to be somewhat of a puzzle in that the connection between the use of the construction and the work characteristics may not be obvious. Open [sic] examination, however, it becomes clear that the use that is ultimately made of the construction will to a large extent determine the task or the work to be performed at the construction site. The task in turn will have certain characteristics which make that project distinguishable from other types of construction. Thus, each of the sectors enumerated, by focusing on the different end uses of the construction, distinguishes one type of construction from other types of construction on the basis of peculiar tasks which are common to that type of project. The work characteristics which distinguish one sector from the other sectors of the construction industry may be shown in terms of the type of problems to be dealt with at the job site, the types of solutions resorted to at certain job sites, the material used, the relative importance of various specifications, the variety of skills and trades, and certain characteristic relations with employees. This list of characteristics is not to be thought of as exhaustive, but as examples of particular characteristics which differ between the various sectors enumerated in the Act.

This passage was quoted with approval by the Board in *Ecodyne Limited*, [1979] OLRB Rep. July 629 at page 634. The Board in this analysis of section 117(e) has referred to various, although not a complete list of, work characteristics which may be considered by the Board. In *West York Construction Ltd.* the Board considered the difficult issues of whether the construction of (i) a structure which contained parking garages and self-contained apartment units and (ii) a structure which served as a Salvation Army Training Centre which contained a playroom, an electrical/mechanical/laundry room and self-contained apartments, came within the residential sector of the construction industry. The only work characteristic considered by the Board in *West*

*York Construction Ltd.* was that of relations with employee. In that case, the Board was dealing with a grey area between work which clearly falls within the residential sector and work which clearly falls within the industrial, commercial and institutional sector. In interpreting the *West York Construction Ltd.* case, the Board stated in *Sword Contracting Limited*, [1985] OLRB Rep. May 743 at page 753 that:

In the *West York* case, the Board was also asked to draw a dividing line between the ICI sectors of the construction industry. In that case, the Board indicated that in instances where it is not clear what sector a construction project comes within, the Board will look to local area practice to see how trade unions and employers regard the work.

It appears that the work characteristics in *West York Construction Ltd.* were sufficiently similar that the Board decided to look beyond the statutory definition of sector as defined in section 117(e).

11. The concepts of area practice and geographic practice, which have been referred to before, find no basis in section 117(e). Similarly, there is no indication in either section 117(e) or section 150 that the Legislature intended to introduce the variable of "area practice" or "geographic area" into sectoral determinations. If such had been the case, the Legislature, in our opinion, would surely have included the words "area practice and geographic area" after the word characteristics in section 117(e). As was referred to earlier, the Legislature has recognized differences based on geography in the certification and accreditation provisions in the construction industry by specific statutory language.

12. In *Steen Contractors Limited*, the Board appeared to indicate that different trades could give rise to different sectoral determinations. There is nothing in sections 117(e) and 150 which indicates that the Legislature intended to fractionate sectoral determinations in this way. In determining appropriate geographic areas under the certification provisions of the Act, the Board contemplated (see, for example, *M. Sule Construction Ltd.*, [1962] OLRB Rep. Nov. 251 and *Welcon Construction Limited*, [1962] OLRB Rep. Dec. 379) and rejected arguments that different trades whose local trade unions had different geographic jurisdictions ought to have different geographic areas for each trade. There exists one set and not several sets of geographic areas in Ontario. The one set of geographic areas applies equally to all trades. In our opinion, by analogy, labour relations would be best served by not making distinctions among the trades in sectoral determinations.

13. The decision of the Board in *Metropolitan Toronto Sewer and Watermain Contractors Association* is clearly of precedential value in a proceeding before the Board. However, since that decision does not set forth its reasons in any great detail and since the description of the work in dispute has not been agreed upon, that decision is not dispositive of the issue under section 150.

14. For the foregoing reasons, the Registrar is directed to list this matter for continuation of hearing. At that hearing the Board will entertain evidence of the work characteristics on the work in dispute from the parties in the sectoral determination under section 150.

15. The parties are directed to endeavour to agree upon a precise description of the work in dispute prior to the hearing.

16. The panel is not seized. The matter is referred to the Registrar.

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**2702-86-R Hakim Samad, Applicant v. Energy and Chemical Workers Union, Respondent v. C. E. Jamieson & Co. (Dominion) Limited, Intervener**

**Representation Vote - Termination - Two employees listed on employee list as being part-time - Employer cannot later resile from this representation that the employees were not eligible to vote in the full-time unit - Union alleging that employer represented to the union outside the proceedings that two other employees were not in the unit - Conduct of employer in the workplace in relation to these employees not affecting eligibility to vote - These two ballots counted**

**BEFORE:** *Robert J. Herman*, Vice-Chair, and Board Members *I. M. Stamp* and *E. G. F. Theobald*.

**APPEARANCES:** *George W. King* for the applicant; *Daniel Ublansky*, *Brian Van Rassel* and *Larry Girard* for the respondent; *D. S. Jovanovic* and *Amelio Fantin* for the intervener.

**DECISION OF THE BOARD;** June 29, 1987

1. This is an application for decertification in which the Board, differently constituted, in a decision dated March 30, 1987, directed that a representation vote be taken as follows:

"5. The Board directs that a representation vote be taken of the employees of the intervener. Those eligible to vote are all employees of the intervener at its Windsor Plant, save and except supervisors and foreman, persons above the rank of supervisor and foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken."

2. Pursuant to that direction a vote was held on April 15, 1987. Of those persons on the voters' list, 39 cast ballots, with 17 ballots marked in favour of continued representation by the respondent, and 17 ballots marked against the respondent. The remaining 5 ballots were segregated and not counted. The Report of the Returning Officer, setting out the results of the vote, was posted in the workplace and employees were advised of their opportunity to make representations with respect to any matter relating to the representation vote, and their obligation to file such representations with the Board by April 23, 1987. The Notice to Employees accompanying the Report of the Returning Officer also indicated that if no such statements of desire to make representations were filed as required, "the Board may dispose of the application upon the material before it without further notice to the parties or the employees."

3. In response to written representations received from the intervener employer and the respondent union, a hearing was convened in order to consider the eligibility of the five persons who cast the segregated ballots. None of those five individuals themselves filed written representations with respect to their eligibility or appeared at the hearing into this matter.

4. At the commencement of the hearing the parties agreed that Dan Gravel was not eligible to vote and his segregated ballot ought not to be counted. We therefore direct that Gravel's ballot be destroyed and not counted.

5. The remaining four employees fall within two categories. Juan Cuevas and Manuel Cuevas were both employees at the time this application was filed. As required under the Board's Rules, the employer filed Schedules indicating the employees it submitted fell within the bargaining unit in question (Schedule A), and those employees regularly employed for not more than

twenty-four hours per week (Schedule B). Employees on Schedule B would not be within the bargaining unit, which for purposes of this application is set out in the recognition clause of the collective agreement and excludes employees regularly employed for not more than twenty-four hours per week. The intervener employer therefore represented to the Board, by filing Schedule B containing the names of Juan and Manuel Cuevas, that neither of those individuals was within the bargaining unit subject of this decertification application. Based on that representation, and the fact that no party disputed it, the Board proceeded with the application and determined the number of employees in the bargaining unit, and whether the applicant had obtained the voluntary signatures of over 45 percent of the employees in the unit. The employer now seeks to take the position that its prior representation, upon which the Board conducted its inquiry, was incorrect and that those two individuals were in fact in the bargaining unit at the time the application was filed, and at the time the vote was directed and the time the vote was held.

6. As the Board stated in *Union of Canadian Transport Employees*, [1985] OLRB Rep. Oct. 1541:

“This Board has consistently held that parties should not be permitted to later resile from agreements made in earlier stages of certification proceedings: see, for example, *Diasons Press Limited*, [1964] OLRB Rep. Aug. 215; *Bertie District High School Board*, [1964] OLRB Rep. Aug. 231, *Warner Brothers Distributing (Canada) Limited*, [1974] OLRB Rep. Dec. 883; and, *J’s Restaurants Limited*, [1977] OLRB Rep. July 465. ...”

For the same reasons that the Board will not allow parties to resile from their representations or agreements made in earlier stages of a certification proceeding, we take the view that the intervener employer cannot now resile from its agreement made at an earlier stage of this decertification proceeding. It would be both inequitable and an abuse of Board proceedings to allow the intervener employer to now assert the eligibility to vote of two employees whom it previously maintained before the Board were not properly within the bargaining unit. Indeed, the Board has acted upon that prior representation. As noted above, neither of these two employees has chosen to participate in this proceeding, and neither of them is asserting that he ought to have been eligible to vote. We are not prepared to conclude that the fact that they voted must mean that they felt they were properly in the bargaining unit. As we will not allow the employer to now assert the eligibility of Juan and Manuel Cuevas to vote, and as neither of them asserts it, they remain ineligible and their ballots shall be destroyed and not counted.

7. With respect to the other two employees Carlos Duran and Iasc Hector Juarez, there is no prior representation before the Board that these two individuals are outside the bargaining unit and ineligible to vote. The employer is therefore free to raise and argue their eligibility. Duran and Juarez were hired by the intervener subsequent to the filing of the application and the Schedules and on the evidence would fall within the bargaining unit. We are satisfied they were employed in the bargaining unit as of the date the vote was directed and as of the date the vote was held. They would accordingly meet the eligibility requirements set by the Board in directing the representation vote. The respondent union argues that neither ballot should be counted as the employer represented to the union, outside these proceedings, that neither Duran nor Juarez was within the bargaining unit. Although the union concedes that the language of the recognition clause in the collective agreement would include these individuals, it argues that the conduct of the employer, in representing to the union that these employees were part-time and not covered by the collective agreement, indicates the intention of the parties that these individuals are not part of the bargaining unit. Counsel submits that the parties’ treatment of these individuals as excluded, before the vote was ordered, gives content to the recognition clause in the collective agreement. Interpreting the clause in light of the parties’ behaviour indicates that these individuals are not covered by the scope clause of the collective agreement, and they are therefore not within the bargaining unit and

not eligible to vote. The union submits in effect that the employer is estopped from now arguing that these people are in the bargaining unit, given its behaviour in treating these people as excluded from such coverage. In support of this position the union relies on a previous decision of this Board, *Kilgoran Hotels Limited carrying on business as Ye Olde Brunswick Tavern*, [1975] OLRB Rep. May 431.

8. We are not persuaded by this submission. As we noted, Duran and Juarez meet the eligibility requirements set by the Board and their ballots would therefore ordinarily be counted. The employer has not in these proceedings made representations or conducted itself in such a fashion that we would preclude the employer from raising concerns about the eligibility of these individuals. Rather, the only reason suggested for either estopping the employer from arguing that Duran and Juarez are eligible, or for holding that they are ineligible to vote, is the conduct of the employer in the workplace in its interaction with the union. Whatever complaint or grievance the union may have with respect to that conduct, it cannot in these circumstances effect the eligibility to vote of the two individuals in question. In *Kilgoran Hotels (supra)*, it is unclear whether the positions taken therein by the respondent union, from which that panel of the Board would not allow the respondent to resile, were positions taken in a proceeding before the Board. Given the chronology of events in that case, it is likely that the representations were made during the Board's proceedings and relied upon in some way by the Board. That decision would therefore be consistent with the decision we have reached in this proceeding with respect to Juan and Manuel Cuevas in not allowing the employer to resile from its prior agreement. Even if the representations by the respondent in *Kilgoran Hotels* did not form part of the Board proceeding and the Board therein estopped the respondent union from challenging the eligibility of the employees in question (and assuming we adopt the view that conduct extraneous to a Board proceeding can estop a party from arguing the eligibility of an employee to vote), there is insufficient evidence before us on which to conclude that the employer ought to be estopped. We have no evidence of detrimental reliance by or prejudice to the union.

9. Accordingly, for the reasons given above, we hereby direct that the ballots of Duran and Juarez both be counted and the results disclosed to the parties.

10. This matter is referred to the Registrar.

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**0432-87-R Mohinder Gill, Applicant v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Respondent v. ABC Taxi (Brockville) Ltd., and Safe-drive Inc., carrying on business as City Cab, Intervener v. Group of Employees, Objectors**

**Termination - Notice to bargain sent outside sixty day period set out in Act - Numerous unfair labour practice complaints filed by union - Collective bargaining proposals difficult to develop in taxi industry - Haste in filing application a relevant factor - Whether Board should consider conduct following the date on which the termination application was filed - Application dismissed**

**BEFORE:** S. A. Tacon, Vice-Chair, and Board Members G. O. Shamanski and B. L. Armstrong.

**APPEARANCES:** Peter Milliken and Mohinder Gill for the applicants; Frank Reilly and Harry

*Ghadban* for the respondent and for the employee objectors; *N. S. Dillon, Mohan Gill* for the intervener.

#### **DECISION OF THE BOARD; July 10, 1987**

1. The name of the respondent is amended to read: "Retail, Wholesale and Department Store Union, AFL:CIO:CLC."
2. The name of the intervener employer is amended to read: "ABC Taxi (Brockville) Ltd. and Safedrive Inc. c.o.b. as City Cab."
3. This is an application under section 59(1) of the *Labour Relations Act* seeking a declaration terminating the bargaining rights of the respondent union.
4. The parties agreed that the bargaining unit was described in the certificate issued to the respondent union on March 6, 1987, as all employees of the intervener employer (in this application) in Brockville, save and except supervisors, persons above the rank of supervisor, office and dispatch staff. The parties further agreed that the applicant was an employee in the bargaining unit.
5. There was no dispute that notice to bargain was given by letter dated May 29, 1987, from the respondent union and the employer replied in writing on June 4, 1987. The applicant conceded that the timing of the notice to bargain fell outside the sixty day period set out in section 59(1) of the Act. It is also appropriate to note at this juncture that the instant application was filed on May 12, 1987, shortly after the sixty day period expired.
6. The Board concurred with the parties' agreement that the respondent union lead its evidence with respect to its explanation for exceeding the statutory period for giving notice to bargain in section 59(1) of the Act. In this regard, the respondent union called one witness, H. Ghadban. The applicant and the intervener employer did not wish to call evidence on this issue. Having weighed and assessed the testimony, including the credibility of the witness, the Board makes the following findings of fact.
7. At the Board hearing on February 27, 1987, in respect of the union's certification application, the employer was represented by E. Rovet. Ghadban, an experienced union organizer in the taxi industry, had dealt with Rovet before as counsel of record in other certification proceedings involving taxi companies. As noted earlier, a certificate was issued dated March 6, 1987. Ghadban testified that a section 89 complaint brought by the union over the termination of M. Marshall was verbally settled at that time as well on the basis that Marshall was to be reinstated but the financial details were to be worked out later. (Five other grievors were named in that complaint as well). Marshall apparently was not reinstated. Several telephone calls between Ghadban and Rovet did not resolve the issues; ultimately, Rovet indicated that the employer was not prepared to reinstate Marshall.
8. Several other complaints were filed by the union pursuant to section 89 of the Act. One complaint, dated March 9, 1987, named three persons as grievors, A. Chevrier, H. Schaub and M. Marshall. Another, dated March 23, 1987, named T. Johnston and D. Plumley as grievors. With respect to these complaints, the parties met with a Board Officer on March 30; hearings were held on May 25, 26 and 27, with five continuation dates set in July and August, 1987. A third complaint, concerning D. Plumley, G. Grant and H. Schaub, was filed on June 25, 1987, the day of the hearing of the termination application. Ghadban stated that the delay in filing resulted from the postal

strike, necessitating personal delivery of the complaint. While Plumley had been terminated sometime in April, Ghadban had learned only recently the details of Plumley's departure.

9. It is useful to note here that on April 6, 1987, Ghadban met Rovet at an arbitration hearing unrelated to this employer. At that time, Rovet informed Ghadban that he was no longer acting for the employer and that the union should forward its bargaining proposals directly to the employer. At the February certification hearing, the two had agreed that the contract proposals would be sent to Rovet.

10. On March 8, 1987, Ghadban held a meeting at the Queen's Grant Hotel in Brockville to discuss bargaining proposals and elect a negotiating committee. Approximately twenty-five employees attended. When Ghadban explained that, although all employees in the bargaining unit could vote for ratification of the collective agreement, only union members could participate in the meeting, about six or seven employees, including the applicant, left. The three persons elected to the negotiating committee were: M. Marshall, T. Nicholson, and D. Plumley. Contract proposals were received from those attending the meeting.

11. The negotiating committee met with Ghadban to prepare contract proposals. Ghadban was to draft specific contract language to reflect the committee's concerns. Plumley however, was terminated from his employment and began working for another taxi company in Brockville. Plumley felt he thereby had a conflict of interest and resigned from the committee. Nicholson also left his job and, likewise, resigned from the negotiating committee.

12. On May 3, 1987, Ghadban convened another meeting of the employees to elect replacements for the two persons who had left the negotiating committee. About twenty-five persons attended. Ghadban again explained that only union members could participate. On this occasion, though, six or seven employees, including the applicant, joined the union by signing membership cards and paying one dollar. Ghadban also explained at both this and the previous meeting that the union took the position that Marshall had been terminated contrary to the *Labour Relations Act* and, until the Board ruled otherwise, he was entitled to participate in meetings and sit on the negotiating committee. The applicant stood for election but two others, M. Ferguson and D. Bak, were elected by the employees. Sometime thereafter, Ghadban queried Bak with respect to her support for the termination application. Bak confirmed her involvement with the petition supporting the termination application and resigned from the negotiating committee.

13. Ghadban decided to proceed with the two person committee. As mentioned earlier, the notice to bargain was dated May 29, 1987. Ghadban testified that the notice was sent before he learned of the termination application, although the latter application was filed with the Board on May 12, 1987. In all, about four or five meetings of the union negotiating committee were held in addition to numerous telephone discussions. The first negotiating meeting with the employer was held on June 17, 1987, where the union presented a complete set of proposals. Ghadban indicated that the employer wished to receive a full set of proposals rather than demands on a piecemeal basis.

14. Ghadban also testified that, in his experience, both the certification process and preparation of contract proposals in the taxi industry were complex and time-consuming. With respect to bargaining, he stated that "standard form" contracts used in plant settings were not appropriate to the taxi industry and, even within that field, the differences in issues, terminology and employer operations precluded a standardized approach. In cross-examination, Ghadban stated that compliance with the sixty day period for notice to bargain would not have permitted sufficient time to formulate bargaining proposals and meet within the period (15 days) prescribed in the Act (section 15).

15. The representative for the respondent union reviewed the evidence in the context of the Board jurisprudence dealing with the purpose of section 59 of the Act. It was argued that, if the Board was satisfied with the union's explanation for the delay, the application should be dismissed. The union's representative submitted that the union had not "slept" on its bargaining rights but had been actively involved in representing the employees in the bargaining unit. Cases referred to in support included: *Walmer Transport Co. Limited (Hamilton)* 53 CLLC ¶17,062; *Dominion Stores Limited, Wallaceburg*, 56 CLLC ¶18,047; *Medi-Park Lodges Inc.*, [1979] OLRB Rep. Oct. 1007; *Canwood Lachute*, [1979] OLRB Rep. Dec. 1140; *Fuller's Restaurant*, [1981] OLRB Rep. Feb. 156; *Darrigo's Supermarkets Ltd.*, [1982] OLRB Rep. Jan. 32; *Prescott Machine and Welding Inc.*, [1983] OLRB Rep. Feb. 250; *F.C.M. Construction Limited*, [1982] OLRB Rep. May 670; *West Bend of Canada*, [1982] OLRB Rep. July 1091; *Rapid Ready-Mix Limited*, [1982] OLRB Rep. Sept. 1348; *Comstock Funeral Home Ltd.*, [1982] OLRB Rep. Oct. 1436; *Bois A. Lachance Lumber Limited*, [1984] OLRB Rep. Jan. 1; *Nepean Roof Truss Ltd.*, [1986] OLRB Rep. Sept. 1279.

16. The intervenor employer made no submissions.

17. Counsel for the applicant stressed that the application was brought by an employee in the bargaining unit and submitted that the test was less stringent than where an employer was seeking to terminate a union's bargaining rights. In reviewing the evidence, counsel stated he was not asserting that the union had exhibited an uncaring attitude but that the union had failed to comply with the period prescribed by section 59(1) for giving notice to bargain and, further, there was disaffection amongst employees as to the manner in which the union was representing them. Counsel contended that the Board should not immediately terminate the union's bargaining rights but, rather, should direct a representation vote. Specifically, counsel emphasized the time-consuming and costly hearings before the Board (differently constituted) in respect of several complaints under section 89 of the Act and noted yet another section 89 complaint filed with the Board on the day of the instant hearing (although not before the Board dealing with the termination application). In response to a Board query, counsel clarified that he had given final argument and took the position that the voluntariness of the petition in support of the application and the reaffirmations of support for the union were irrelevant as the application was brought under section 59(1), not 57, of the Act. Counsel noted that he was prepared to lead evidence as to the voluntariness of the petition if the Board so wished and that counsel for the applicant sought to reserve his right to call evidence regarding the petition and reaffirmations of support should the Board not be satisfied with the explanation offered by the respondent union for the delay.

18. Section 59(1) of the Act reads:

If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

19. It is also useful to refer to the following passage from *Prescott Machine and Welding Inc.*, *supra*:

The purpose of section 59 is to protect employees (and, in a proper case, the employer) against a bargaining agent which neglects to forward the interests of the employees but instead "sleeps" on its bargaining rights. As the Board has indicated in a number of cases, the section is not meant to be used to penalize a union, but rather is a means by which an interested party can bring the material facts to the attention of the Board so that the Board can call upon the trade union to provide an explanation for its failure to bargain. In instances where the union has not met the time requirements set out in section 59, but has either sought to bargain relatively soon

afterwards or has some reasonable explanation for its delay, the Board will generally dismiss the application outright. See, *Trizec Equities Ltd.*, [1978] OLRB Rep. Feb. 189 and *Mohawk Construction Limited*, [1981] OLRB Rep. Aug. 1156. If, on the other hand, the union has been inactive for a substantial period of time, or if it appears that the union has made a decision not to exercise its rights, the Board will generally terminate its bargaining rights. See, *Darrigo's Supermarkets Ltd.*, [1982] OLRB Rep. Jan. 32. It is generally only in those cases where a union has failed to bargain for a fairly lengthy period of time without any reasonable explanation for its delay, but where nevertheless the facts suggest that it is still interested in actively representing the employees, that the Board will direct the taking of a representation vote. See *F.C.M. Construction Limited*, [1982] OLRB Rep. May 670.

20. The Board possesses a wide discretion under section 59 of the Act to determine the appropriate response to a termination application under this provision. This discretion is to be exercised with a sensitivity to the statutory purpose to ensure active representation of employees in a bargaining unit by their bargaining agent. Even where the objective conditions in section 59 are met, that section is not to be applied mechanically nor are a union's bargaining rights to be automatically terminated: *Medi-Park Lodges Inc*, *supra*; *Walmer Transport Co. Ltd.*, *supra*.

21. In the instant case, the respondent union cannot be characterized as "sleeping" on its rights. Rather, the union was actively involved in advancing the interests of the bargaining unit members. Firstly, the union repeatedly sought to protect bargaining unit members from alleged unfair labour practices. The three unfair labour practice complaints filed on behalf of a number of bargaining unit members prior to the application date (including the February 27, 1987, complaint which the union thought was settled in principle) attest to a continued concern by the union for the welfare of those whom it represents. Secondly, with respect to its collective bargaining obligations, the union proceeded methodically to canvass the views of union members, elect a negotiating committee and formulate proposals. Meetings with the membership were held on March 8 and May 3. The negotiating committee was convened on four or five occasions in addition to numerous telephone calls from Ghadban to discuss proposals. The resignations from the negotiating committee do not reflect negatively on the union; indeed, Ghadban acted promptly to replace those vacancies. It is, however, reasonable to expect that the turnover would delay the preparation of a complete set of proposals. As noted in *Medi-Park Lodges*, *supra*, the union should not be penalized for thorough preparation, for doing the groundwork necessary to present a complete set of bargaining proposals, particularly where the employer evidently preferred to await the presentation of a full text rather than receive demands on a piecemeal basis. Moreover, the Board accepts the uncontradicted evidence of Ghadban that collective bargaining proposals are complex and difficult to develop in the taxi industry because of the diversity of employer operations and the concomitant absence of standardized contract language. In the Board's view, throughout the period from certification to the date the termination application was filed, the union was actively working on behalf of the bargaining unit.

22. The Board is also concerned with the extreme haste with which the termination application was filed, just a few days after the sixty day period set out in section 59. That haste is a relevant consideration in the Board's decision: *Bris A. Lachance Lumber*, *supra*; *Holley Electric Ltd.*, [1965] OLRB Rep. May 136; *Grant Ready Mix Limited*, [1967] OLRB Rep. Dec. 892. Moreover, in the instant case, the applicant, after leaving the first meeting on March 8 because he refused to sign a union card, reversed his stance and not only joined the union at the second meeting on May 3 but stood for election to the negotiating committee. Approximately one week later, having failed to be elected, the applicant sought to decertify the union.

23. Section 59 is directed at protecting bargaining unit members from an "absentee" bargaining agent. The section is not a vehicle for triggering an otherwise untimely representation vote: *Prescott Machine and Welding*, *supra*; *The London Soap Company Limited*, [1987] OLRB Rep.

Feb. 241. Counsel for the respondent asserted that the “petition” in support of the termination application (and the reaffirmations of support) were irrelevant as the application was brought under section 59 rather than section 57 of the Act. The Board agrees with this view: *The London Soap Company, supra*. In section 59 applications, the Board’s focus is the conduct of the bargaining agent during the relevant period. Section 57 of the Act permits a testing of the wishes of the bargaining unit employees with respect to their continued support for their bargaining agent during specified time periods and subject to the other conditions in that section. The conduct of the bargaining agent may well be relevant to the extent of that agent’s continued support amongst its employees but is not the focus of the Board in dealing with a section 57 termination application, in contrast to an application under section 59.

24. For the foregoing reasons, then, the Board is satisfied that the respondent union was actively fulfilling its obligation to represent the employees in the bargaining unit. The Board does not regard it as appropriate to exercise its discretion under section 59 of the Act to direct that a representation vote be held or to terminate the respondent union’s bargaining rights outright. In the alternative, if the signatures on the petition are relevant, and assuming those signatures are voluntary while those on the reaffirmations of support are not, the Board would not have reached a different conclusion in all the circumstances of the instant case.

25. The Board intends to deal briefly with one other aspect, namely, whether the Board should consider conduct following the date on which the termination application was filed. The Board notes that Ghadban testified that the notice to bargain was given in a letter dated May 29, 1987, *before* he received notice of the termination application. The first negotiating meeting with the employer was on June 17, 1987, where the union presented a complete set of bargaining proposals.

26. The following excerpt from *West Bend of Canada, supra*, is apposite:

The Board notes that the respondent in this application sought to have the Board consider evidence of its conduct in representing members of the bargaining unit after this application was filed. In view of the Board’s disposition of this application, the Board does not consider it appropriate to decide whether such evidence could ever be relevant to the question which section 59 raises. Such evidence could obviously suffer from the weakness of being self-serving in nature, and the Board notes that no previous case has been cited in which the Board has ever looked beyond the date of the application. As the Board commented in *Mohawk Engineering*, [1981] OLRB Rep. Aug. 1156, at paragraph 7:

The Board looks at the conduct of the parties during the whole period from the giving of notice to bargain to filing of the application under section 51 in order to decide how to exercise its discretion.

27. The Board affirms the concerns expressed above with respect to the self-serving nature with which one would generally regard such evidence. Nor need the Board here conclusively determine whether such evidence could be a relevant consideration in section 59 applications. In the instant case, though, given the filing of the application just days after the expiry of the sixty day period, if the period at least to May 29, 1987, (the date of notice to bargain) is considered, the concerns about self-serving evidence are not applicable as the Board accepts Ghadban’s testimony that, at that point, he had not learned of the termination application. In this context, the Board is further satisfied that the union was not derelict in fulfilling its obligations as bargaining agent. Thus, even if the relevant period is extended to May 29, 1987, the Board would not terminate the union’s bargaining rights or direct a representation vote.

28. For the foregoing reasons, then, this application is dismissed.

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**0615-86-OH; 0616-86-OH; 0617-86-OH** Ralph Marion, Jim Fawcett, Roland Vautour, Complainants v. **Commonwealth Construction Company**, A Division of Guy F. Atkinson Ltd., Respondent

**Discharge - Health and Safety - Complainants alleging that respondent discharged them to prevent them from raising further safety problems - Employer maintaining the discharges resulted from the complainants disrupting the workplace and refusing to do their regular work - Complainants were not authorized health and safety representatives but were doing safety inspections on company time - OHSA not authorizing employees to act as self-appointed safety representatives - Employees not terminated because they were exercising rights under OHSA - Five day suspension substituted for two of three discharges**

**BEFORE:** *Robert J. Herman*, Vice-Chair, and Board Members *R. J. Gallivan* and *B. L. Armstrong*.

**APPEARANCES:** *John A. Desotti*, *Roland J. Vautour*, *Ralph Marion* and *James Fawcett* for the complainants; *James G. Knight*, *Thomas Zvyitski* and *R. A. S. March* for the respondent.

**DECISION OF THE BOARD;** July 2, 1987

1. The name of the respondent is amended to read: "Commonwealth Construction Company, A Division of Guy F. Atkinson Ltd."

2. In this consolidated proceeding, the complainants each allege that they were discharged by the respondent employer in contravention of their rights as contained in section 24(1) of the *Occupational Health and Safety Act* (hereinafter, the "Act"). The complainants allege they were constantly pointing out safety infractions to the respondent and it discharged them to prevent them from raising further safety problems or from insisting on the correction of those problems already identified. They therefore claim they were discharged because they were acting in compliance with the Act or regulations, or because they were seeking its enforcement. The respondent maintains it did not discharge them for these reasons, but because they were refusing to do their regular work and were instead taking company time, without authorization and after notice to cease doing so, to hold discussions with fellow employees, disrupting the workplace and causing other employees not to work. It denies that any part of the reason for discharging them was because of the health and safety matters they raised. In response, the complainants deny they were taking regular work time to deal with their health and safety concerns, and maintain they raised such concerns only on their own time, before or after working hours, during breaks, or during the regularly held safety meetings with the company, when it was expected that they raise these concerns. They also deny that they in any way caused disruptions among other employees. The complainants do not argue, in this respect, that they were entitled to pursue their safety concerns to the detriment of performing their regular work, but only that their activities did not, for even a moment, occur when they were on work time.

### I. The Facts

3. Algoma Steel Corporation owned the construction site and was constructing a new seamless tube mill under the supervision of Fenco Engineers Inc., the project manager. The respondent employer was one of numerous contractors working under the overall supervision of Fenco, and was engaged for three separate contracts: one for piping, one for mechanical and piping, and one for electrical work. The respondent worked at Algoma on these projects from approxi-

mately the end of October, 1985 until July, 1986. The tube mill project was large, and the respondent's employees had to regularly walk through areas of the mill other than the one where they worked.

4. The work week began every Monday morning with a safety meeting convened by the respondent, which all employees of the respondent were expected to attend, during which safety concerns were raised and discussed. Attendance was taken at each meeting, as were extensive minutes of the discussions, and those minutes were subsequently typed up and made available to employees. At these meetings the three complainants, along with three or four other employees, regularly raised safety concerns. Except as noted below with respect to Marion, there was no evidence nor even any suggestion that any of the three complainants raised safety concerns with management except at these safety meetings. Nor was there any evidence that the manner in which the three complainants raised their concerns, and the frequency with which they did so, was in any way different from the conduct of the other three or four employees who also regularly raised concerns during these meetings. Those other individuals were not subjected to any discipline, though their conduct during the meetings was indistinguishable from the conduct of the complainants.

5. Each of the complaints filed is almost a carbon copy of the others and each lists approximately 83 identically worded examples of the "concerns and problems expressed by the complainant". Counsel for the complainants drafted all 3 complaints and, in itemizing the concerns the complainants claimed they raised with management, copied virtually verbatim the minutes taken by the respondent at the safety meetings. No specific evidence was led of any of the complainants raising even one of the 83 particularized problems, only generalized evidence that they continually raised safety problems during these meetings. We note that some of the complaints were raised at meetings which none of the complainants attended, yet they claim they were discharged for raising them. Nevertheless, we are satisfied that each of them did at numerous safety meetings raise many matters which they felt represented safety problems. In addition, the complainant Marion had contacted his MPP to discuss safety concerns he held about the workplace, and had advised management he would be contacting the Ministry of Labour. He also refused specific assignments on several occasions, because he felt conditions unsafe. On each such occasion he was given another assignment immediately, without any quarrel or discipline from management.

6. Employees of the respondent were represented in health and safety matters by Alfred Gemus, who was also the union steward. It is common ground that Gemus was the properly designated health and safety representative (cf. section 7 of the Act) and that none of the complainants was ever properly appointed or designated health and safety representative. As the safety meetings continued to be held each week, and as the complainants became frustrated because they felt their concerns were not being resolved, the complainants and some other employees attempted to nominate their own health and safety representative. The complainants testified they were not trying to replace Gemus, only trying to insure that their own concerns were being presented. The employees involved in nominating their own representative were not confident that Gemus was an effective health and safety representative, and they felt someone had to begin assuming that role. Neither the union executive, nor the majority of union members, shared the complainants' concerns in this respect.

7. Some employees approached the complainant Marion and asked that he act as their health and safety representative. Marion testified he was "nominated by the men" and that it was imperative that something be done quickly to rectify the unsafe conditions. Accordingly, Marion went to the office of Thomas Zyvitski, the respondent's electrical superintendent for the project. Marion advised Zyvitski he was now a safety representative for the employees, and he further indicated he would be conducting his own safety inspections, in addition to whatever inspections

Gemus performed. He also advised he would be doing these inspections on company time. Zyvitski warned Marion against taking work time to perform inspections and asked that he do the work his subforeman directed of him.

8. Zyvitski subsequently observed Marion conducting inspections, speaking to employees, and contacting the safety representatives of other companies who were working at the site, all during times when he should have been performing his work. Zyvitski told Marion he was not to take time off work in order to act as a safety representative. Zyvitski stated he felt Gemus was the official representative, and only he was entitled to cease performing his regular work and do safety inspections during company time. Gemus, the designated health and safety representative and shop steward, was present when Zyvitski made these comments to Marion. Zyvitski issued Marion a written warning, dated February 26, 1986, that stated, in part, "that from this point onward, if you are found in an area other than your work area during the hours of work and you do not have a valid reason for being there, you will be dismissed immediately from Commonwealth's employ." In response to receiving the written warning, Marion advised Zyvitski he would continue as he had, since (he then said) he had the right to do so under the *Occupational Health and Safety Act*. Notwithstanding Marion's claim that he was legally entitled to continue, the written warning was not grieved.

9. At the hearing Marion initially testified that he had never investigated safety problems during regular working hours, and he never wandered from his job. This testimony was consistent with the claim of the complainants that they never took any company time for their activities. Marion subsequently admitted, when pressed in cross-examination, that he did wander from his job in order to take photographs of what he perceived to be safety problems. He also testified that he did not pursue his activities on the job, "at least at the beginning." On the totality of the evidence, including Zyvitski's testimony that he repeatedly observed Marion in parts of the site where Marion was not working, continuing to investigate safety matters at times when he should have been performing his job, we are satisfied Marion attempted to mislead the Board and that he continued to leave his work station after receipt of the written warning, he continued to investigate safety matters at the work site when it meant ceasing to do his regular work, and he moved about the site taking photographs. Marion did so repeatedly and on numerous occasions, with the result that on these numerous occasions he was not performing his assigned work. We are further satisfied that when confronted by Zyvitski during these wanderings, he denied that he was wandering or that he was looking for unsafe working conditions.

10. On March 7, 1986, Marion was handed a termination notice by Zyvitski, on the grounds Marion had ignored the prior warning, had continued to leave his work in order to investigate safety problems, and because he had broken an Algoma Steel Corporation rule by using a camera on site.

11. In the week following Marion's termination, Zyvitski was made aware that the other two complainants, Fawcett and Vautour, were also wandering around the work site and leaving their own work stations, purportedly in order to investigate safety matters themselves, or at least to attempt to replace Marion as the "alternate" health and safety representative (as the complainants characterized it). After being advised of this, over the next few days Zyvitski observed Fawcett and Vautour in parts of the site external to their work areas, gathering groups of employees together and engaging in discussions with them. Work ceased during these discussions. Zyvitski had the general foreman get the employees to return to work, and Fawcett and Vautour to return to the area of the site where they were supposed to be working.

12. As Marion had in his testimony, both Vautour and Fawcett initially denied that they

had, for even a moment, ever discussed health and safety matters with fellow employees during regular working hours, other than at the weekly safety meetings, let alone with any loss in productive work time. As noted, counsel for the complainants based his case with respect to Vautour and Fawcett on the proposition that they had never taken company time to deal with health and safety matters. As with the testimony of Marion, we prefer the evidence of Zyvitski where it conflicts in this respect, both because of our observations of the manner in which the witnesses testified and because of internal inconsistencies or implausibilities in the testimony of the complainants. For example, Vautour and Fawcett were work partners for approximately three weeks prior to their terminations. They would therefore have been together for the great majority of each working day during this period. One of their common tasks involved using a "bender" machine. Because there was only one bender at the work site, employees regularly had to line up and wait their turn at the machine. During these waits, there was no useful work employees could perform. Vautour testified that he and Fawcett had waited their turn at the bender approximately 50 to 100 times. Vautour further testified that *not once* during those moments was there any discussion engaged in by either him or Fawcett with fellow employees over health and safety matters in the work place. That no such conversations occurred is highly implausible, given Fawcett's and Vautour's obvious and deeply felt concern about safety matters in the workplace, their constant efforts at safety meetings to improve what they perceived to be an unsafe work environment, and the fact that there was no useful work they could do while they waited. Although Fawcett initially testified, in support of Vautour's evidence, that neither he nor Vautour had ever discussed health and safety matters while waiting at the bender, in cross-examination he admitted they might have discussed such matters with fellow employees. Such evidence generally undermines Vautour's and Fawcett's credibility. We conclude Vautour and Fawcett attempted to mislead the Board in this respect. We are satisfied that both did wander around the job site, utilizing company time, time when they were scheduled to work and were being paid to work, to discuss health and safety matters with fellow employees and the nomination of another employee to replace Marion as a health and safety representative. As noted earlier, it was not suggested that either Vautour or Fawcett ever raised safety concerns with the company during their regular working hours, other than at the safety meetings when other employees also raised them.

13. After Zyvitski observed Fawcett and Vautour wandering around the site, holding these discussions with fellow employees, he asked Ray Shelstead, a site foreman and a member of the union executive, to speak to them and convince them to stop using company time to "orchestrate the removal of Gemus as health and safety representative." Shelstead subsequently did speak at least to Fawcett, relaying Zyvitski's concern and asking that both complainants cease and desist from engaging in their safety activities during their regular working hours. Shelstead subsequently reported to Zyvitski that he had spoken to both Fawcett and Vautour, but his discussions had been to no avail.

14. In light of Shelstead's report that his approach had been fruitless, and in light of Zyvitski's previous observation that Vautour and Fawcett continued to use company time to hold their discussions, on March 13, 1986 Zyvitski handed written notices of termination to both Vautour and Fawcett. Those notices stated, *inter alia*, "you are being terminated from site in an effort to avoid further disruptions in the work." Each of them had previously received written warnings. On January 11, 1986 Vautour had been warned for an incident with his foreman, during which they had been shouting at each other, which the company viewed as Vautour's fault. Fawcett had been warned on February 11, 1986 for refusing to do work to which he had been assigned (he did not refuse for safety reasons). Neither warning was grieved.

15. Zyvitski testified his concern was not that Vautour or Fawcett were raising what they thought were health and safety problems, but that they were utilizing company time to do other

than company work, and were further causing other employees to stop work. He felt the employees had a properly designated health and safety representative, Gemus, but a minority of them were not content to let Gemus represent them, nor were they content to seek to replace him during their own time. Both Vautour and Fawcett had received prior written warnings, though for unrelated matters, yet they continued to be impossible to direct. In order to ensure that work was being performed, Zyvitski testified he decided it was necessary to discharge both of them. Any discipline less than discharge would be ineffective, Zyvitski felt, because neither the warning and discharge of Marion nor Shellstead speaking to them had had any curative effect.

## II. The Argument

16. In argument, counsel for the respondent submitted section 24(1) of the Act protected employees only when they had been dismissed *because* they had acted in compliance with the Act or *because* they had sought enforcement of the Act or its regulations. Counsel suggested that even at the end of the case, the Board remained unapprised as to what parts of the Act or its regulations might have been violated. The complainants had not pointed to any specific subsection of the Act or its regulations which the employer had allegedly violated, either during the events in question or at the hearing before the Board. The particulars set out in each complaint had been taken verbatim and chronologically from the safety minutes arising from the company's safety meetings. Counsel noted it was somewhat ironic that the company's accurate and proper recital of the safety concerns should now be raised against it, without any evidence of the complainants' having raised particular concerns, and without any allegation of a particular section of the Act the respondent might have breached because of its working conditions. Counsel submitted that many of the itemized particulars did not involve even arguable violations of safety legislation. Additionally, many of the safety concerns had nothing to do with the respondent company and were not matters within the respondent company's control. The respondent reacted properly when those matters were raised, by expeditiously passing on such concerns to the employer or contractor who did have control of such matters, and also by continuing to seek their correction or enforcement. Since the concerns were not within the respondent's control, there was nothing more it could do. Counsel submitted the sole reasons for termination of the complainants were those set out in the notices of termination, as attested to in Zyvitski's evidence before the Board.

17. Counsel further submitted that if the Board is satisfied the company did not breach section 24(1) of the Act in the discharges of the three complainants, it is not as a matter of law open to the Board pursuant to section 24(7) to substitute a penalty it might consider appropriate in the circumstances. Alternatively, if the Board does have such jurisdiction, it ought to exercise it cautiously and deferentially. When complainants allege a scheme by an employer designed to circumvent the protections of the Act, but are unable to prove such matters at hearing, the Board should hesitate before second-guessing the employer's disciplinary response. The purpose of section 24(7), in counsel's submission, was to address situations in which an employee refuses to work, because he or she fears an unsafe working condition, but is nevertheless unable to prove at a hearing that the refusal was justifiable within the meaning of the Act. In such circumstances the Board may well consider the discipline imposed too extreme a company response, given a complainant's sincere yet unfounded fears, and substitute discipline the Board considers appropriate. The more remote however, from circumstances involving refusal to work because the employee feels personally in danger, the more hesitant a Board should be to rely upon its jurisdiction under subsection 24(7). In counsel's submission, the respondent had met its onus under section 24(5), had satisfied the Board that the reasons for termination were only those reasons set out in the notices of termination, and the discharges were not motivated by any concern over the health and safety matters raised by the complainants nor by any concern over the complainants seeking to enforce the provisions of the Act. The complainants were each terminated for causing disruptions to the work force over signifi-

cant periods of time, and in Marion's case, additionally for taking photographs of the workplace, in direct contravention of a rule of Algoma Steel Corporation. Had these employees had legitimate safety concerns, they could have and should have raised those concerns in the proper manner and through the proper procedures, by having their health and safety representative raise them, by refusing to perform work which they felt to be unsafe, or by attempting to replace the health and safety representative through the proper internal union procedures. Instead, they chose to disrupt the work force, without any legal right to do so, and continued to refuse to follow the proper procedures for raising safety concerns. In such circumstances, counsel submitted, it was perfectly proper for the employer to discharge them.

18. Counsel for the complainants submitted the complainants were terminated because they were a "pain in the butt", and continually raised health and safety problems with the respondent. Counsel submitted that none of the complainants ever wandered from their jobs or ever used company time to raise these matters or to discuss health and safety problems with other employees. In Marion's case, counsel conceded in final argument that at most he might have taken ten to fifteen minutes of company time, when he was taking photographs.

19. Counsel observed that on several occasions the complainants had refused to perform their respective jobs because of such safety concerns, had contacted their local MPP, and had told management they might approach the Ministry of Labour in order to get it to investigate. The reasons for their terminations were linked, he argued, to their constantly raising these problems and the difficulties such persistence was causing the respondent. They were therefore discharged because they were acting in compliance with the Act or because they were seeking to enforce it. Counsel submitted it was incumbent upon the Board to make a determination as to whether the working conditions were a violation of the Act or regulations thereunder, and indeed the Board could not decide the section 24 issue until it did so. Counsel submitted that common sense, the photographs taken by Marion, and the provisions of the Act itself (he did not refer the Board to any specific section) all indicated that the items set out as particulars in the complaints and as raised by the complainants were indeed violations of the Act. In the alternative, if the Board were satisfied the employer had discharged its onus under section 24(5) of the Act, counsel relied upon subsection 24(7) and asked that the Board order reinstatement of all three complainants. All three had been sincerely and deeply concerned about what they felt were safety violations at the work site, they acted out of a concern for the welfare of all employees, including themselves, and in the case of Fawcett and Vautour, prior disciplinary warnings they had received were completely unrelated to the circumstances causing termination. In those circumstances, counsel suggested termination was too severe a penalty.

### III. The Decision

20. Section 24 of the *Occupational Health and Safety Act* reads as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Notwithstanding subsection (2), a person who is subject to a rule or code of discipline under the Police Act shall have his complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

21. The issue we must decide is why the complainants were discharged. This turns on our finding of the facts, based on our assessment of the evidence and whether we believe the company's claim that it discharged them because they wouldn't perform their work, or the complainants' claim that they *were* performing their work and never took company time for their pursuits, and were discharged because they raised safety matters. Put in terms of the statutory language, were the complainants discharged *because* they acted in compliance with the Act or *because* they sought its enforcement? It is important to understand that what is protected by the Act is the right of employees not to be threatened or disciplined *because* of their acting in compliance with the Act (or regulations etc.) or seeking its enforcement. An employee might engage in conduct warranting discipline, and in those circumstances an employer can impose discipline, provided the discipline is not motivated even in part by a concern that the employee was acting in compliance with or seeking to enforce the Act. Discipline levied for that reason is proscribed by section 24(1). Whether a breach is found will depend on whether the Board concludes that the disciplinary response was even partially prompted because the employee was seeking to exercise his or her rights under the Act. In this respect, the Board's inquiry under section 24 of the this Act parallels the nature of the inquiry under section 89 of the *Labour Relations Act*. As the Board noted in *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577:

44. We now turn to the unfair labour practice provisions underlying this complaint and to a consideration of the law as it relates to the degree of anti union motive necessary to establish such violations of the Act. For the purpose of our analysis it is useful to distinguish between decisions affecting individual employees and major business decisions having potentially broader impact. In dealing with the treatment of individual employees this Board has consistently held that if only one of the reasons for an employer's actions against an employee (discharge, layoff, trans-

fer, demotion, etc.) is related to union activity the action is in contravention of the Act. Given the reverse legal onus mandated by section 79 (4a) the Board has held that to find there has been no violation of the Act in these kinds of cases it must be satisfied that the employer's actions were not in any way motivated by anti-union sentiment. The Board summarized this approach and the effect of the statutory reversal of the legal burden of proof in *The Barrie Examiner* case, [1975] OLRB Rep. Oct. 745 as follows:

... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

(See also *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 294 and *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299.) Judicial support for this application of the law is found in *Regina v. Bushnell Communications et al* (1973), 1 O.R. (2d) 422 wherein the Ontario High Court overturned a lower court decision which had dismissed a complaint under section 110(3) of the *Canada Labour Code*, which is identical in all material respects to section 58 of *The Labour Relations Act*, on the grounds that membership in a union was not established as the 'principal reason' for the termination of employment. The High Court held:

In considering an enactment devoid of the words 'sole reason' or 'for the reason only' applied to the act of dismissal and resting only on the word 'because', the Court must take an expanded view of its application. If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, s. 110(3) of the *Canada Labour Code* has been transgressed.

The decision of the High Court was upheld on appeal by the Court of Appeal (4 O.R. (2d) 288) and was cited with approval by the Federal Court in *Sheehan and Upper Lakes Shipping Limited et al* (1977), 81 D.L.R. (3d) 208. In this jurisdiction, therefore, the Board, with judicial support, applies a 'taint theory' in dealing with alleged unlawful treatment of individual employees. If an employer's actions impact against individual employees and the motives underlying the employer's action are in any way tainted by an anti-union animus the employer is in violation of the Act.

The same sorts of considerations and analysis apply in our view to alleged violations of Section 24 of the *Occupational Health and Safety Act*. If the respondent has convinced us that no part of the reason for the discharges was concern over the complainants' seeking enforcement of the Act or acting in compliance with it, then the respondent will not have violated section 24 of the Act.

22. We must decide whether we believe that the respondent's reasons for discipline were as it has stated: not because of the complainants' safety activities, their acting in compliance with the Act, or their seeking to enforce the Act, but only because they were not doing their regular work or because they were disrupting the work of other employees without the right to do so. We have noted above that the complainants do not claim they were authorized or entitled to cease doing their regular work and walk through other areas of the plant to seek out purported health and safety problems, or to gather other employees together to discuss health and safety at times when the employees and complainants were otherwise to have been working. They argue simply that they only pursued such activities on their own time. We have also noted above that the complainants all tried to mislead the Board in testifying they did not take any work time for their activities.

We have found that they did. Notwithstanding their lack of candour, we must still be satisfied that the respondent did not discharge them because they were seeking the Act's enforcement or acting in compliance with it.

23. Whether or not the safety problems raised by the complainants would in fact be violations of the Act is not a question for this Board to determine. In our view, we have no jurisdiction under this statute except as is described in and circumscribed by section 24. Subsections 1 and 2 of that section restrict our consideration to whether workers have been disciplined, threatened, intimidated, or coerced because they have acted in compliance with the Act or regulations or because they have sought their enforcement. The authority to determine whether a particular machine, condition, or environment is in fact in a state that is unsafe and violates the Act has been given to others. Regardless of whether a working condition is in fact unsafe, we must ask ourselves whether a worker was disciplined (or threatened, etc.) *because* he or she sought the enforcement of or *because* he or she acted in compliance with the Act. In that respect, we are satisfied that each complainant believed he was seeking the enforcement of the Act or its regulations in his raising of many of the complaints. They were not raising these matters only to harass the respondent. That many of the conditions complained of might not be contraventions of the Act or regulations does not mean the complainants were not seeking the enforcement of the Act or regulations. They are only required to have bona fide sought its enforcement, not to have raised what are ultimately held to be violations.

24. Employees must be able to seek enforcement without fear of reprisals and with full protection for their efforts in this regard. Indeed, section 17 of the Act imposes a duty upon employees to seek enforcement of the Act and to report contraventions to the employer. Section 17 reads as follows:

(1) A worker shall,

- (a) work in compliance with the provisions of this Act and the regulations;
- (b) use or wear the equipment, protective devices or clothing that his employer requires to be used or worn;
- (c) report to his employer or supervisor the absence of or defect in any equipment or protective device of which he is aware and which may endanger himself or another worker;
- (d) report to his employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he knows; and
- (e) where so prescribed, have, at the expense of the employer, such medical examinations, tests or x-rays, at such time or times and at such place or places as prescribed.

(2) No worker shall,

- (a) remove or make ineffective any protective device required by the regulations or by his employer, without providing an adequate temporary protective device and when the need for removing or making ineffective the protective device has ceased, the protective device shall be replaced immediately;
- (b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself or any other worker; or

- (c) engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct.

Methods of seeking enforcement could not therefore be limited to the right of an employee to refuse to perform hazardous work (under section 23) and the right of the designated representative to perform inspections and point out problems (under section 7). The Act both requires employees to seek its enforcement and protects their rights to do so; it does not prescribe the only ways in which employees can exercise those rights. It was clear, both from the complainants' and respondent's perspective, that the complainants were seeking to enforce what they honestly perceived to be the requirements of the Act. Accordingly, we are satisfied the complainants sought the enforcement of the Act, and they can rely on section 24. We do not propose to comment upon whether, nor do we suggest that, the working conditions were in fact in violation of any of the provisions of the Act or its regulations.

25. Similarly, we need not determine whether the respondent would have been ultimately responsible for correcting all the safety matters complained of by the complainants. The respondent argues that many of the alleged infractions involved work areas or working conditions were not matters over which it had any control, nor were they tools, work areas, or working conditions which any of the respondent's employees was required to use. (We note that the complainants conceded this in their testimony.) For example, the respondent argues that any concern with respect to welding masks and the safety of the welding procedures was the concern of another contractor on site, whose employees were engaged in welding, and not the concern of the respondent whose employees did not participate in the welding that was the subject of the complaints. The complainants, as noted above, were seeking the enforcement of this Act and its regulations, and we do not read section 24(1) as affording protection to workers only when they complain about alleged safety violations for which their own employer is responsible. In the instant case, the complainants were required to work in a setting where various contractors and their employees were sharing the same workplace. In such circumstances it would be artificial and would undercut the purpose and protections afforded by the Act to restrict employees to complaining only about unsafe work conditions which are the responsibility of their own employer, when at the same time their working environment might involve exposure to dangerous conditions under the control of employers other than their own. Employees must feel free to and be able to raise safety concerns with respect to any working condition. We read section 17 as requiring such employee response and section 24(1) as protecting employees when they do raise these concerns.

26. The Act did not authorize the complainants to wander from their jobs and investigate safety matters in other parts of the site. Section 7 of the Act specifically deals with circumstances in which employees may pursue health and safety matters to the neglect of their regular employment duties:

7.-(1) Where the number of workers at a project regularly exceeds twenty, the constructor shall cause the workers to select at least one health and safety representative from among the workers on the project who do not exercise managerial functions.

(2) Where no committee has been established under section 8, or where the number of workers at a project does not regularly exceed twenty, the Minister may, by order in writing, require a constructor or an employer to cause the selection of one or more health and safety representatives for a work place or a part or parts thereof from among the workers employed at the work place or in the part or parts thereof who do not exercise managerial functions, and may provide in the order for the qualifications of such representative or representatives.

(3) The Minister may from time to time give such directions as the Minister considers advisable concerning the carrying out of the functions of a health and safety representative.

(4) In exercising the power conferred by subsection (2), the Minister shall consider the matters set out in subsection 8(4).

(5) The selection of a health and safety representative shall be made by those workers who do not exercise managerial functions and who will be represented by the health and safety representative in the work place, or the part or parts thereof, as the case may be or, where there is a trade union or a trade unions representing such workers, by the trade union or trade unions.

(6) A health and safety representative may inspect the physical condition of the work place or the part or parts thereof for which he has been selected, as the case may be, not more often than once a month or at such intervals as a Director may direct, and it is the duty of the employer and the workers to afford the health and safety representative such information and assistance as may be required for the purpose of carrying out the inspection.

(7) A health and safety representative has power to identify situations that may be a source of danger or hazard to workers and to make recommendations or report his findings thereon to the employer, the workers and the trade union or trade unions representing the workers.

(8) Where a person is killed or critically injured at a work place from any cause, the health and safety representative may, subject to subsection 25(2), inspect the place where the accident occurred and any machine, device or thing, and shall report his findings in writing to a Director.

(9) A health and safety representative is entitled to take such time from his work as is necessary to carry out his duties under subsections (6) and (8) and the time so spent shall be deemed to be work time for which he shall be paid by his employer at his regular or premium rate as may be proper.

(10) A health and safety representative or representatives of like nature appointed or selected under the provisions of a collective agreement or other agreement or arrangement between the constructor or the employer and the workers, has, in addition to his functions and powers under the provisions of the collective agreement or other agreement or arrangement the functions and powers conferred upon a health and safety representative by subsections (6), (7) and (8).

27. Subsection 7(9) ensures that work time can be taken to perform health and safety duties, but it is only the properly chosen representative (in this case Gemus) who is specifically authorized by law to do so. Other employees, while free to exercise their rights under section 23 to refuse work they believe to be unsafe, and under section 17 to report contraventions of the Act (amongst other matters) to the employer, are not authorized by the statute to act as health and safety representatives and exercise the powers of or perform the functions of a health and safety representative. It cannot be said, in the circumstances, that the complainants were acting in compliance with the Act when they wandered to other areas of the work site during their regular work time. They were not the designated representative who might well be acting in compliance with the Act by such wanderings or investigations. The Act deals with a wide range of matters and contains a spectrum of rights, obligations, and methods of seeking enforcement. While that spectrum does not delineate all the ways in which employees can seek enforcement (for example, see subsections 17(1)(d)), the Act does not give each employee the right to cease performing his or her work and act as health and safety representative, or to cease working at his or her discretion even though the current work assignment presents no safety problem (cf. section 23). None of the complainants was specifically authorized by the Act to stop doing their assigned work and to travel around the site, to either discuss health and safety matters with other employees or to investigate what they believed to be safety violations. Their activity in this regard was not sanctioned per se by the statute. However, even where they seek enforcement to the detriment of their regular work, employees are protected if the employer disciplines them *because* they were seeking such enforcement.

28. As noted above, we accept the evidence of Zyvitski over that of Marion as we did not find Marion a credible witness. Marion had been wandering from his job in order to inspect the

work site for safety infractions, and had been asked by Zyvitski to cease taking company time to do so. He had also been given a written warning to the same effect. Despite the warning, he indicated he intended to continue to act as he had in the past. The warning he received was not grieved. Marion was not a "health and safety representative", selected pursuant to section 7 of the Act and was therefore not entitled to take time from his work in order to investigate what he perceived to be safety problems within the work site, yet he did take time from his work for this purpose, repeatedly, and in the face of the warning he received to not do so in the future. He also in effect advised the employer he would continue to wander around the site to the detriment of his regular work.

29. A discharge might seem somewhat harsh for an employee in Marion's circumstances. We have therefore considered carefully whether his discharge must have been motivated by reasons other than were given at the time and other than were recited at the hearing, and particularly, whether the discharge was motivated even in part because of the health and safety activities Marion continued to pursue. The Board is well aware that the reasons given for discipline may conceal actual motivation, and assessing the circumstances may lead to an inference that improper reasons partially formed the basis for the employer's response. Because the behaviour in question revolved around attempts to seek enforcement of the Act, and because the employer knew that Marion was pursuing health and safety matters during his wandering, we have scrutinized the circumstances particularly closely, to ensure no breach of the Act occurred.

30. It assessing the circumstances, however, we must keep in mind that the job site was a construction project, of approximately 9 months duration. In construction, employers must be able to count on skilled tradesmen performing their jobs efficiently and effectively. In this respect we adopt the comments expressed by the Board in *Canadian Engineering and Contracting Co. Ltd.*, [1983] OLRB Rep. July 1017:

11. We accept, of course, that the employer-employee relationship in the construction industry is not a close one, and is not comparable with relationships that arise between employers and their employees in an industrial setting. Employment relationships are transitory and, as in the present case, workers will be referred from the hiring hall and employed for short periods of time without the kind of pre-selection which would be undertaken by an industrial employer before engaging workers who could conceivably be employed on a long-term basis. Accordingly, we accept the need for a certain amount of realism and arbitral restraint in determining what constitutes just cause for discharge in a construction context. However, we are not persuaded that either the arbitral jurisprudence or the language of the collective agreement before us requires us to apply considerations that are *totally different* from those applied by arbitrators to employers who use the same language in collective agreements in other industries. In particular, the Board is of the view that the employer must at least warn a grievor that his job is in jeopardy prior to discharging him for "unsatisfactory performance" - which is what we found has happened in the circumstances of this case. In *Re Harold R. Stark Limited et al.* (1972), 1 L.A.C. (2d) 406 (Egan), the majority of the Board observed (at pages 406-407):

It was argued by the company that because of the special nature of the construction industry, different considerations ought to apply with respect to the discharge of employees to those obtaining in industry in general. In this regard, it is of some significance to note that the grievors are not in the position of long-term employees whose previously acceptable work performance has deteriorated. The grievors were assigned to the company by the union under the terms of the collective agreement. That is, of course, an arrangement quite common in the construction industry. In consequence of this practice, the grievors were taken on without any pre-hiring or qualifying interview such as might enable the company to make a pre-employment assessment. They entered into the employment of the company purporting to be competent tradesmen and were not subject to any probationary period of evaluation by the company. Therefore, there is no question of any knowledge, on the part of the company, as to

the proficiency of the grievors at the time of their engagement as tradesmen qualified in the classifications which they hold.

We are not wholly persuaded, however, that totally different considerations from those applied to industry in general are applicable to discharge cases in the construction industry. In this connection, our attention was drawn to *Re United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 221, and Fraser-Brace Engineering Co. Ltd. (1968)*, 19 L.A.C. 258 (Christie). This case involved the question of the discharge of an employee for 'loafing' on a construction site. The company, in that case, argued that different considerations applied to discharge in the construction industry. The board, in its decision in that case, stated that it was not unimpressed by the argument that rather different considerations may apply in the determination of what constitutes just cause for dismissal in the construction industry.

The grievor in the *Fraser-Brace* case, *supra*, appears to have been a chronic time waster, but received no admonitions from the company with respect to his conduct prior to his discharge. The Board went on to say, however, that "It is unnecessary to decide what differences it makes that we are dealing with the construction industry. Even if the requirements of 'cause' and just cause were considerably lower than they are in general industrial situations 'cause' for dismissal was not established here." The board went on to find that the discharge was unjust because of the absence of a warning and reinstated the grievor.

See also *Proweld Company Limited*, [1982] OLRB Rep. March 437, and *White and Greer Company Limited*, Board File No. 1404-81-M, decision dated November 23, 1981, unreported, in which this Board confirmed that prior to the discharge of an employee in the construction industry for lack of production or inadequate quality, the employee is entitled at least to a warning that the employer is dissatisfied.

12. We accept these propositions. Notwithstanding the rather special environment of the construction industry which would arguably warrant a lesser standard of 'just cause' for discharge, it is our view that before an employee can be justly discharged for inadequate work performance he must at least be warned that his performance is inadequate and that if it does not improve his continued employment would be jeopardized. In the absence of such warning so that an employee clearly understands the standard of performance expected of him, it is our opinion that a discharge would be unjust.

Health and safety and the rights under the Act must still be protected; we mean only that the inference we might draw from the employer moving directly from a written warning to a discharge (in the case of Marion) or to discharges without prior written warnings (Vautour and Fawcett) must be assessed in this construction context.

32. Given the construction nature of the project, given all the circumstances, and given that we found Zyvitski credible and his explanation borne out by the circumstances, we are satisfied that the respondent terminated Marion solely because he had ignored the prior warnings, was continuing to take time from his work in order to wander around the company site, and in addition because of its view that he had violated the no camera rule of Algoma Steel Corporation. No part of the reason for Marion's termination was company concern over his seeking the enforcement of the Act or over the safety problems he was raising, or his persistence in raising them. It was his persistence in not doing his job in the face of a clear warning that led to discipline. Accordingly, the company did not violate section 24 in its discharge of Marion.

33. We turn now to consider, with respect to Marion, whether the penalty of discharge was appropriate in the circumstances and whether we ought to substitute such other penalty as we might consider "just and reasonable in all the circumstances". Subsection 24(7) of the Act reads as follows:

“(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.”

There was no suggestion that the collective agreement contained a specific penalty for any of the infractions in question.

34. As noted, counsel for the respondent contended that subsection 24(7) only applies if the Board finds a contravention of subsection 24(1). We do not find that submission to be persuasive. We interpret subsection (7) as giving the Board jurisdiction, in circumstances when the Board finds that the employer has not violated subsection 24(1) of the Act, to substitute such other penalty as to the Board seems just and reasonable in all the circumstances. In this respect we follow the approach taken by the Board in numerous prior cases (see for example *Baltimore Aircoil of Canada*, [1982] OLRB Rep. March 327; *Inco Metals Company*, [1982] OLRB Rep. Sept. 1315; *Toronto Transit Commission (Wilfred George Love, Complainant)*, [1985] OLRB Rep. Feb. 344; *Camco Inc.*, [1985] OLRB Rep. Oct. 1431; *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798). If subsection 24(7) only applied if subsection 24(1) had been contravened, it would be redundant, as the Board already has such power in these circumstances, by virtue of subsection 24(3), which makes all of the subsections of section 89 of the *Labour Relations Act*, except subsection (5), applicable with all necessary modifications to a complaint filed under subsection 24(2). Thus, the Board's power to remedy the contravention of subsection 24(1) by, for example, substituting a lesser penalty, would come from subsection 89(4) of the *Labour Relations Act* as incorporated into section 24 by subsection 24(3).

35. As well, the wording of subsection 24(7) on its face gives the Board the jurisdiction to substitute such penalty as the Board considers just and reasonable, even though the Board has not found the employer to have violated subsection 24(1) and even though the Board “determines that a worker has been discharged or otherwise been disciplined by an employer for cause”. In circumstances such as those in the instant case, where the Board has determined that the employer has not breached the Act in its discharge of an employee, it is both sensible and in accord with the specific wording of subsection 7 for the Board to then inquire whether the employer's disciplinary response was nevertheless appropriate in all the circumstances. Under subsection 24(2), a worker under a collective agreement has a choice of adjudicative forum where a contravention by an employer of subsection 24(1) is alleged, and the worker may elect to have the matter dealt with either by arbitration or by filing a complaint with this Board. The legislature has set up a mechanism under section 24 whereby the worker can have both the occupational health and safety allegation and the merits of the discipline dealt with in one forum, either final and binding arbitration or through a complaint to the Ontario Labour Relations Board. The scheme of section 24, the impact of subsection 24(3), and the language used in subsections 24(2) and 24(7), support the view that the legislature intended that the adjudicative forum chosen by the worker would deal with both the alleged breach of section 24(1), and, in the event the adjudicative tribunal found the employer had not breached the Act, with the issue of whether the specific penalty imposed by the employer for cause was just and reasonable in all the circumstances. No valid labour relations purpose would be served by reading section 24(7) to any other effect.

36. Returning to the circumstances leading to Marion's termination, Marion had received a written warning advising him that the employer considered it improper for him to take work time to pursue health and safety concerns. That warning was not grieved. Despite that warning, Marion advised Zyvitski he intended to continue taking regular work time to do safety inspections around

other parts of the site. Marion gave no indication that the written warning had had any effect upon him, nor any indication he was likely to correct his behaviour in the future. Though we accept that Marion was sincerely motivated in his activities, we note there were other methods to deal with safety concerns he had about the work place, including requesting that the official health and safety representative, Gemus, deal with them. Although Marion was clearly unhappy with Gemus' performance as representative, Gemus was the health and safety representative who had been selected pursuant to section 7 of the Act, and was entitled to remain in that position until duly replaced. There was no credible evidence that Gemus was not effectively performing his safety duties. Whatever alternatives might have been available to Marion to ensure a safe work place, it was not open to him to continue to ignore the employer's concern that he perform the job for which he had been hired. While it might seem abrupt for an employer to move directly from a written warning to a discharge, this construction project was of limited duration, approximately nine months, and the respondent required that a particular job be done in a relatively short period. In all these circumstances, and particularly given that Marion continued in the face of a written warning issued for the same problem and announced that he intended to so continue, we do not substitute any penalty for that termination.

37. We turn lastly to the complaints with respect to Fawcett and Vautour, which we propose to deal with together as their circumstances are similar. Although both Vautour and Fawcett had raised on numerous occasions during safety meetings their concerns about the health and safety conditions in the work place, so too had other employees. There was no evidence (nor suggestion) that Vautour or Fawcett ever raised a safety concern with management other than at a safety meeting, nor that they were more persistent or vocal in the safety meetings than three or four other employees. Despite employees raising those matters regularly during such meetings, and over a several month period, none of them, including Vautour and Fawcett, were disciplined or in any way treated improperly or threatened. Discipline was only meted out to Vautour and Fawcett when Zyvitski observed them in areas of the site away from their work areas, talking to fellow employees during working time, subsequent to Zyvitski's termination of Marion for not performing his work and subsequent to Zyvitski having an official of their own union speak to them about the company's concerns. As noted earlier, we are satisfied that Vautour and Fawcett did neglect their work in order to wander around the site, and the discussions with other employees did cause disruptions to the work force and the work day.

38. As in Marion's case, a discharge might seem unduly severe an employer response to Fawcett's and Vautour's behaviour and might lead to an inference that ulterior motives guided the employer's actions. On balance however, we remain satisfied that the respondent's disciplinary response was not motivated in whole or in part by any concern over Vautour or Fawcett acting in compliance with the Act (or regulations etc.) or seeking to enforce the Act or its regulations, but only by concern over their not performing their work and disrupting others from their work. We accordingly have found the respondent did not breach the Act. Zyvitski had discharged Marion the previous week, after discovering his written warning to Marion had been futile. Vautour and Fawcett knew about Marion's discharge and the reasons for it. In the face of that discharge, Zyvitski reasonably believed he confronted two fellow employees similarly persisting in neglecting their work and disrupting the work of other employees. He sent a site foreman, an executive member of their union, to speak to them and try to get them to stop, but Zyvitski was advised the effort was futile. At that point, Zyvitski felt he was losing control of the work place and that a strong disciplinary response was necessary in order to convey in concrete terms to employees that they were not to stop performing their regular work. While discharges in similar circumstances in an industrial setting might well lead us to infer improper motivation, we do not draw that inference here, given the construction work site, our finding that Zyvitski was a credible witness, and our acceptance of his evidence.

39. Although the respondent did not breach the Act, we next consider whether the discharges were just and reasonable in all the circumstances, pursuant to our authority under section 24(7). Unlike Marion, the prior written warnings received by Fawcett and Vautour were for completely unrelated matters, though issued within the previous two months. Both these complainants were sincerely motivated and were not raising health and safety concerns, either at the workplace or before the Board, as an excuse to refuse to do their regular work. The company itself had viewed a written warning as an appropriate response for a first offence for similar behaviour in that it had issued a written warning to Marion for such misconduct. After Marion was discharged, Fawcett and Vautour would or should have realized that serious repercussions might attend behaviour like Marion's. Nevertheless, we are not satisfied that their behaviour was so similar to Marion's that they ought to have known that *discharges* would result. They had not clearly been warned that their wanderings and disruptions might lead to termination, nor had they indicated after being warned (as Marion had) that they would continue despite the warning. They might well have responded to a disciplinary response short of discharge, even in light of the ineffectual warning issued to Marion. Evidence was not led to establish how much work time was lost by Vautour and Fawcett not doing their work and by their disrupting the work of fellow employees, nor did we have sufficient evidence on which to conclude how many employees stopped working because of their activity. It does not appear, however, that the disruptions they caused were excessive. Again, the construction context underscores the employer's need for effective disciplinary treatment. We view the discharges of Fawcett and Vautour as unduly harsh and unreasonable in the circumstances, and we substitute as a more just and reasonable disciplinary response a 5 day suspension for each of them. Such a suspension would have given a strong message that the respondent was insisting its employees do their jobs. At the same time, given the relatively minor disruptions of which we had evidence and the lack of clear warning, it would not have unduly penalized Fawcett and Vautour in order to make an example of them to others.

40. As the construction project in question has been completed, and there is no employment to which Fawcett and Vautour can be reinstated, we accordingly direct that each of them be compensated by the employer as if they had only been suspended for 5 working days, subject to the applicable principles of mitigation. We remain seized should the parties have any difficulty in implementing this remedial relief.

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**0373-87-U General Contractors' Division of the Construction Association of Thunder Bay Inc., Applicant v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America and Labourers' International Union of North America, Local 607, and Labourers International Union of North America Ontario Provincial District Council, Respondent v. Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, Intervener**

**Bargaining Rights - Collective Agreement - Construction Industry - Prior Board decision concerning different parties holding that Union could not represent construction labourers in the ICI sector of the construction industry - Applicant seeking declaration that collective agreement with Union unlawful - Analysis of principles of *res judicata* and *in rem* - Prior Board decision is a decision *in rem* - Collective agreement between applicant and Union declared null and void**

**BEFORE:** *R. A. Furness*, Vice-Chair, and Board Members *C. A. Ballentine* and *I. M. Stamp*.

**APPEARANCES:** *Joseph Liberman* for the applicant; *L. C. Arnold* and *W. McIntyre* for Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America; *S. B. D. Wahl* and *P. Little* for Labourers' International Union of North America, Local 607, and Labourers International Union of North America Ontario Provincial Council; *N. L. Jesin* for the intervener.

**DECISION OF THE BOARD;** July 31, 1987

1. This is an application under section 135(2a) of the *Labour Relations Act*. Section 135(2a) states:

Where, on the complaint of an interested person, trade union, council of trade unions, employers' organization, employee bargaining agency or employer bargaining agency, the Board is satisfied that a person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency, bargained for, attempted to bargain for, or concluded any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection 146(1), it may direct what action, if any, a person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations, or employer bargaining agency, shall do or refrain from doing with respect to the bargaining for, the attempting to bargain for, or the concluding of a collective agreement or other arrangement other than a provincial agreement as contemplated by subsection 146(1).

2. The financial secretary of the Building Trades Council of Northwestern Ontario (the "Council") appeared at the hearing and requested status to participate in the application. The Council had not participated in any of the proceedings which will be referred to subsequently. In addition, the Council had not intervened in this application and the financial secretary had not been authorized to represent the Council before the Board. The financial secretary conceded that he was "just here on my own". After hearing the representations of those who appeared before it, the Board ruled that the financial secretary and the Council which he purported to represent did not have status to appear in this application.

3. The respondent Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America ("Local 2693") denied that it is an affiliated bargaining agent and, in addition or in the alternative, denied that it has entered into any agreement other than a provincial agreement as contemplated by section 146(1). It was the position of Local 2693 that this application was inappropriate and should be dismissed without a hearing. It was also the position of Local 2693 that if the Board determined to hold a hearing, the same ought to be adjourned pending a ruling by the Minister of Labour on an application for designation, presently referred to the Board pursuant to section 139(4) of the Act. In addition, it was also the position of Local 2693 that an adjournment should be granted on the further ground that there is presently before the Board an application for reconsideration in *EKT Industries Inc.*, [1987] OLRB Rep. March 352. Having regard to the importance and the relationship of that decision to the instant application, Local 2693 reasoned that it would be appropriate to adjourn this application pending such request for reconsideration.

4. The request for an adjournment was supported by the intervener and opposed by the applicant and Labourers' International Union of North America, Local 607 and Labourers' International Union of North America Ontario Provincial District Council ("Local 607"). In order to

understand the instant application and the request for an adjournment, it is necessary to refer briefly to two earlier proceedings which also involved Local 2693, Local 607 and a local trade union of the intervener and a concurrent proceeding in the form of a reference to the Board from the Minister of Labour.

5. On November 10, 1983, Local 2693 filed an application for certification under the construction industry provisions of the Act with respect to certain employees of EKT Industries Inc. ("EKT"). Prior to the terminal date in that application, Local 607 intervened and claimed bargaining rights for those employees. Local 607 also filed on December 6, 1983, a referral of a grievance to arbitration by the Board pursuant to section 124 of the Act. That referral named as respondents EKT, Tamarron Group Inc. ("Tamarron") and Tamarron Construction Limited ("Tamarron Construction") and requested certain remedies pursuant to section 63 and/or section 1(4) of the Act. The application for certification and the referral were consolidated and heard together. Local 2693 claimed that EKT was the successor of, or related to, an entity called Kamtar with which Local 2693 allegedly had a collective bargaining relationship. Local 607 claimed to represent construction labourers employed by EKT by virtue of its provincial collective agreement with Tamarron. In the course of the hearing the Board was invited, on the agreement of the parties, to consider what the parties described as the "affiliated bargaining agent issue". The hearing of the consolidated cases required thirty-seven days. The Board heard extensive evidence and argument on the organizational and bargaining history of Local 2693 over some thirty years and whether on the dates of these two applications Local 2693 was an affiliated bargaining agent as defined in section 137(1)(a) of the Act. In a decision dated March 27, 1987, the Board decided that Local 2693 was an affiliated bargaining agent within the meaning of section 137(1)(a) of the Act and could not lawfully represent the construction labourers of EKT in the industrial, commercial and institutional sector of the construction industry because of the statutory scheme regulating collective bargaining in the Act. The Board noted that Local 2693 does not appear among the affiliated bargaining agents represented by the Carpenters' Provincial Employee Bargaining Agency established pursuant to section 139(1)(a) of the Act or on any other designation of the Ministry of Labour. The Board reasoned that unless Local 2693 appeared on the designation it could not engage in collective bargaining for the construction labourers employed by EKT regardless of its past practice. The Board also noted that any collective agreement affecting employees in the industrial, commercial and institutional sector of the construction industry other than the provincial collective agreement between the designated employer and employee bargaining agencies would be null and void by virtue of section 146 of the Act. The Board dismissed the claim of Local 2693 for bargaining rights and held that Local 607 had a stronger successor rights/related employer claim under sections 63 and 1(4) of the Act. It appears that the board dismissed the applications of Local 2693 for certification and for relief under sections 63/1(4) and granted the request of Local 607 for relief in those areas of the consolidated application where there was a dispute with Local 2693. While this decision of the Board is with respect to EKT, the reasoning in the decision, if accepted and applied to other employers in like circumstances, would call into question the bargaining rights of Local 2693 with respect to such employers in the industrial, commercial and institutional sector of the construction industry. The decision which has been discussed in this paragraph is hereinafter referred to as the "first decision".

6. The implications of the first decision were apparently very clear to Local 2693 and in a letter dated April 8, 1987, Local 2693 requested the Board to reconsider its decision dated March 27, 1987, pursuant to the provisions of section 106(1) of the Act. The request was in two parts. Firstly, a request for the decision to be amended so as to provide for a stay for its effectiveness pending a determination of an application to the Minister of Labour for the designation of Local 2693 as an employee bargaining agency under section 139(1)(a) of the Act, and/or pending a determination of the application for reconsideration of the first decision. Secondly, a request that the

Board reconsider and revoke the first decision. In a letter dated April 23, 1987, the Minister of Labour advised counsel for Local 2693 as follows:

This is in reference to your request submitted on behalf of the Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America for a designation pursuant to section 139 of the *Labour Relations Act*.

In my opinion, the request raises issues related to the Ministerial designations of employee bargaining agencies, issues related to the meaning of "affiliated bargaining agent", as well as general issues related to the intent of the province-wide bargaining system. Pursuant to section 139 of the Act, I will be referring this matter to the *Ontario Labour Relations Board*. More specifically, I will be requesting that the Board consider whether the requested new designation is necessary or appropriate and whether any alteration or amendment to the existing designations is necessary or appropriate.

You will be notified by the Registrar of the Board concerning the date of its hearing into this matter.

The Board has commenced hearings on this reference from the Minister of Labour before a differently constituted division of the Board.

7. Yet another differently constituted division of the Board entertained the request for a stay of the effectiveness of the decision of the Board dated March 27, 1987. The Board denied the request for a stay of the effectiveness of the decision of the Board dated March 27, 1987. The references in the following quotation to the "Franks decision" is the equivalent of the first decision referred to in the instant decision. In *EKT Industries Inc.*, [1987] OLRB Rep. May 696 (Board Files 1856-83-R and 2087-83-M, decision dated May 27, 1987) [reported at [1987] OLRB Rep. May 696] the Board stated:

13. Section 106(1) of the Act confers upon the Board a plenary independent power to reconsider, vary, or revoke any earlier decision if the Board considers it advisable to do so. . In exercising that authority, the Board is not restricted to a consideration of the facts as they existed at the time of the original order and may consider any new or subsequent facts which it deems relevant. In appropriate circumstances, and with due regard to the principles of natural justice, that power of reconsideration may be exercised by a differently constituted panel of the Board. If it were otherwise, reconsideration would not be available to a party if, after the release of the decision, a panel member died or was otherwise unwilling or unable to act. No doubt it is convenient and prudent to have the original panel reconsider its decision because that panel will be in the best position to know the evidence and argument that was before it and to decide whether its decision should be varied. Indeed, if the request, for reconsideration involves a challenge to the Board's factual findings or reference to the evidence before the Board, the case may have to go back before the original panel because, in the absence of a transcript, there is no way that anyone else would be in a position to address those issues. If another panel tried to deal with the matter it might be drawn into what is, effectively, a trial *de novo*, which would seriously undermine the finality of the decision which section 106 itself contemplates. Leaving aside the nature of the hearing which might be required, however, we do not think there is any absolute legal requirement that the power of reconsideration can only be exercised by the panel making the original decision. Moreover, here, we are not asked to reconsider or reject the factual or legal conclusions of the Franks panel; we are only asked to temporarily stay the operation of its decision until Local 2693's other legal options have been explored.

14. On the other hand, we are not persuaded that is either necessary or desirable to stay the Franks decision. Based on the facts, as found, (which the applicants for a stay do not here contest), they are only able to say that there is an argument that the decision may be wrong. They do not, and in our opinion cannot, argue that there is a strong *prima facie* case that this is so. They can plausibly argue that the decision exposes a potential problem from their point of view because, if the designation order is not amended, Local 2693's bargaining rights for other companies may be subject to attack. But that is only to say that the Board should grant a stay because they claim the decision is wrong or because the law, as it is, is not as Local 2693 and its

supporters would like it to be. That cannot be a basis for reconsidering or staying a Board decision. The same claim be made in virtually every Board case. Nor can we give much weight to the Carpenters' contention that they thought the case would turn out differently and that the *status quo* would be maintained. That belief may be understandable, but the fact is that the provincial bargaining scheme established in 1978 is based significantly on established craft/trade distinctions, and, within that context, it is not so surprising that the Board might conclude that a local of the Carpenters' union would not be entitled to represent construction labourers, who, under the provincial bargaining scheme (and elsewhere in Ontario) are represented by the Labourers' union.

15. It is also interesting to note that the Board is not required to, and does not bring its proceedings to a halt even when its jurisdiction is challenged on an application for judicial review (see *Re Cedervale Tree Services Ltd. and Labourers International Union of North America, Local 183 et al.*, [1971] 3 O.R. 832). An aggrieved party must seek relief from the Court by way of a judicially imposed "stay" pending judicial review. If the Board does not bring its proceedings to a halt when its very jurisdiction is challenged in Court, why should it do so simply because Local 2693 asserts that the Franks panel was "wrong", or because Local 2693 *may* be able to persuade the Minister to alter a designation order so as to preserve the anomaly in northwestern Ontario of a Carpenters ABA representing construction labourers, and the Minister *may* have jurisdiction to do so retrospectively so as to revive or "breathe life" into bargaining relationships which, as things now stand, are *deemed* by the statute to be illegal. (Again, we make no comment about whether the Minister can or should do so.) Assuming, as we do, that the Board has the power to "stay" its own decisions, it is a power which should only be exercised in truly exceptional circumstances, and if it is to be exercised by a different panel of the Board the circumstances must be even more extraordinary (bearing in mind that similar relief is available from a Court on an application for judicial review, with the added safeguard of judicial discretion and "costs"). Otherwise expedition and finality would be seriously prejudiced.

16. We accept the submission that the E K T determination, if followed by other panels of the Board in other proceedings may lead to a result contrary to the interests of Local 2693. But there is nothing particularly unusual about that. Whenever the Board makes a significant legal determination there is the possibility that it will set a precedent which will be followed by other panels. . More telling, though, is Local 607's argument that any stay granted of the E K T decision cannot foreclose another panel of the Board considering the reasoning of the Franks panel or coming to the same conclusion, nor would it foreclose Local 607 from raising the matter. There are practical and institutional reasons why the Board should not encourage continued litigation on the same point; however, the Board is not strictly bound by the doctrine *stare decisis*, (See: *re Medi Park Lodges Inc. and Ontario Nurses Association and O.L.R.B.* - unreported decision of the Divisional Court dated November 3, 1981) and it is open to other parties to argue either that the original decision was wrong on the basis of the facts as found, or that there is other evidence not put before the original panel which might prompt another panel to reach a different conclusion. In the result then, any purported "stay" of the Franks decision would not put an end to litigation, but would merely prompt Local 607 to mobilize the same evidence and mount the same argument that was made successfully before the Franks panel. And, of course, we cannot ignore the collective bargaining reality in northwestern Ontario where two unions - Local 2693 and Local 607 - are now engaged in active competition to represent construction labourers. Any determination which advances the interests of one union and its supporters necessarily retards the interests of the other union and its supporters. Thus, for example, at E K T, Local 607 has now established bargaining rights for construction labourers so that available work opportunities will now be distributed among its members. Conversely, if the E K T decision is stayed, work opportunities will presumably go to members of Local 2693. The balance of convenience does not obviously point in either direction; and there is certainly no undertaking that Local 2693 will contribute to any subsequent compensation claim made on behalf of members of Local 607. Finally, we are constrained to note the observation in paragraph 17 of the Franks decision that, over the years, Local 2693 has been "less than candid" with the Board when obtaining the bargaining rights which it now seeks to defend. It purported to acquire bargaining rights for all unrepresented tradesmen when, in fact, it really only wanted to represent labourers.

17. For the foregoing reasons, this panel of the Board is unanimously of the view that the decision released on March 27, 1987 should not be reconsidered, varied, revoked or stayed.

The decision which has been referred to in this paragraph is hereafter referred to as the “second decision”.

8. During the hearing the Board dismissed the request for an adjournment and stated that reasons would be given for that decision. These decisions are now set forth. The Board has the power, if it considers it advisable in the interests of justice, to adjourn any hearing for such time and to such place and upon such terms as it considers fit. Reference is made to section 82(1) of the Board’s Rules of Procedure. The Board has generally refused to grant an adjournment unless all of the parties to a proceeding consent or unless there are exceptional circumstances. See *Nick Masney Hotels Ltd.*, [1968] OLRB Rep. Nov. 833, Dec. 965. In the instant application all of the parties have not consented to an adjournment. Are there exceptional circumstances in this application? Local 2693 and the intervener centred their arguments on the extremity of the Local 2693’s position with respect to its claims to bargaining rights with respect to members and non-members of the applicant. Quite clearly the consequences of any decision which might have been made by the division of the Board which made the first decision would have been of serious consequence to at least one of the parties. The Board in the first decision, on the agreement of all the parties, considered the affiliated bargaining agent issue. The consequences of an adverse decision on the affiliated bargaining agent issue were known or ought to have been known by Local 2693. The collective agreements entered into by Local 2693 were obviously at risk. It is quite clear that Local 2693 and the intervener do not find the first decision to their liking. In any contest the party which receives an adverse decision no doubt finds the decision not to be to its liking and no doubt that feeling is proportional to the loss or prospective loss which has been suffered. The fact that by filing an application for certification Local 2693 has been placed in an extreme position is by no means unique and is not a reason for granting an adjournment. The arguments which were addressed to the division of the Board by Local 2693 in the instant application in support of the request for an adjournment were the same arguments which were addressed to the divisions of the Board which issued the first and second decisions. The request to the Minister of Labour for a designation is not a reason to grant an adjournment. The Board is independent of the Minister and the Minister may either choose not to implement any report from the Board made under section 139(4) of the Act or may decide not to make the designation requested by Local 2693 regardless of the report of the Board. On the other hand, the applicant and its members are being pressed by Local 2693 and Local 607 to adhere to their collective agreement to the exclusion of the other’s collective agreement. The balance of convenience is decidedly in favour of not granting an adjournment. For the foregoing reasons the Board ruled at the hearing that it would not grant the request for an adjournment.

9. The applicant is seeking declaration pursuant to section 135(2a) of the Act that the collective agreement between the applicant and Local 2693 is unlawful and being an agreement other than a provincial agreement is contrary to section 146(1) of the Act and that this agreement is not binding upon the applicant or any of its members.

10. It was the position of the applicant and Local 607 that the first decision that Local 2693 is an affiliated bargaining agent within the meaning of section 137(1)(a) of the Act and that Local 2693 may not lawfully represent construction labourers in the industrial, commercial and institutional sector of the construction industry is a decision *in rem*. It was also the position of the applicant and Local 607 that in the course of proceedings before the Board which resulted in the first decision, the parties treated, by agreement, the issue to be a determination *in rem* such that it could not be relitigated between the parties by virtue of agreements to hold a number of certification proceedings currently pending before the Board in four other files in abeyance and to be subject to the determination rendered by the Board in the first decision. In addition, the applicant and Local 607 pointed out that by its course of conduct since the first decision in seeking a stay and a

new designation from the Minister of Labour Local 2693 ad implicitly acknowledged the *in rem* nature of the decision referred to in this paragraph. Local 2693 argued that *in rem* was a synonym for *res judicata* and is sometimes known as issue estoppel. Local 2693 also argued that the strict application of the judicial doctrine of issue estoppel should have no application to any statutory tribunal such as the Board and, as a harsh doctrine, should be confined strictly for the courts. Local 2693 reasoned that the first decision was only a persuasive value and could not be *res judicata* because the parties in the first decision are different from the parties in the instant application. Local 2693 urged the Board to require the applicant to call evidence in support of its request for relief with a corresponding opportunity for the parties to call evidence.

11. The rule of *res judicata* is grounded on the principles of public policy that the state has an interest that there should be an end to litigation and that no individual should be sued twice for the same cause. The constituent elements of the rule were enunciated in Spencer, Bower and Turner, *Doctrine of Res Judicata* (2d ed., 1969), pp. 18-19:

- (1) that the alleged judicial decision was what in law is deemed such;
- (2) that the particular decision relied upon was in fact pronounced, as alleged;
- (3) that the judicial tribunal pronouncing the decision had competent jurisdiction;
- (4) that the judicial decision was final;
- (5) that the decision was, or involved, a determination of the same question as that sought to be contravened in the litigation in which the estoppel is raised;
- (6) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.

This enumeration has received judicial approval (see *Re Bullen* (1972), 21 DLR (3d) 628, at 631) and this Board's approval (see *Canadian General Electric Company Limited*, [1978] OLRB Rep. Apr. 384, at 386). *In rem*, therefore, is more correctly described as a component of *res judicata* than as a doctrine in its own right. This means that all the other elements of *res judicata* must pertain; *in rem* applies only if the parties are not identical to the parties in the previous proceeding and the decision can be characterized as an *in rem* decision. *In rem* has been defined, in Spencer, Bower and Turner, *Doctrine of Res Judicata*, at 213:

A judicial decision *in rem* is one which declares, defines, or otherwise determines the status of a person or of a thing, that is to say, the jural relation of the person or thing to the work generally, and is therefore conclusive for or against everybody, as distinct from those decisions which purport to determine the jural relation of the parties one to another, and their personal rights and equities *inter se*, and which are commonly termed decisions *in personam*.

12. Both *Canadian General Electric Company Limited*, [1978] OLRB Rep. April 384 and *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501, cite the definition found in *The Canadian Encyclopedia Digest*, 10 C.E.D. (Ont. 3d), at 122:

A judgment *in rem* is universally binding. It is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it concludes [sic] all persons from stating that the status of the thing adjudicated upon was not that declared by the adjudication. Judgments *in rem* are conclusive against all the world, not only as the *res* itself but also as the grounds on which the tribunal professes to decide or may be presumed to have decided.

There is some disagreement whether the grounds upon which the tribunal bases its judgment are *in rem* or *in personam*. Although neither *Canadian General Electric Company Limited*, *supra*, nor *Oakwood Park Lodge*, *supra*, addressed this issue, the court in *McGregor v. McGregor* (1977), 20 O.R. (2d) 680 stated that the grounds for a decision were *in personam* and thus only binding between the parties; it is only the judgment itself which is *in rem*. However, the above excerpt from the *Canadian Encyclopedia Digest* has some judicial support. The Ontario Court of Appeal in *Foster v. Reaume* (1927), 60 OLR 63, [1927] 1 DLR 1024 has held that an *in rem* judgment concludes not only the point actually decided but the grounds of the decision as well. See also, *Love v. Love*, [1969] 1 OR 291, (1969) 2 DLR (3d) 273 (H.C.).

13. *In rem* can be summarized as follows:

- (1) It is a component of *res judicata*. This means that all of the other constituent elements of *res judicata* must pertain.
- (2) An *in rem* decision is a declaration, definition or determination of the status or jural relation of a person or thing to the world generally.
- (3) While it is not entirely clear whether the grounds upon which a decision is based are *in rem* or *in personam*, the better view is that the grounds upon which a divorce is based, such as cruelty or adultery, are in *in rem*.

The main bars to an application of the *in rem* component derive from a missing element of the *res judicata* rule. In *Canadian General Electric Company Limited*, *supra*, the Board considered several factors that could bar the application of *res judicata*. These factors are: (1) A material change in the law. The Board noted that there had been statutory changes to section 1(3)(b) of the Act since 1954 (the date of the decision relied upon to establish *res judicata*) and this satisfied the Board that a *prima facie* case that there had been a relevant change in the law had been made out. In *Canadian General Electric Company Limited*, [1979] OLRB Rep. Jan. 12, the parties had a chance to respond to the *prima facie* case. After hearing submissions, the Board held that even though a change in the law would not have affected the previous decision, the change was sufficient to urge the Board to rehear the question whether cost analysts were employees within the meaning of the Act. (2) A significant change in the facts since the original decision. It is clear that a change in facts, as does a change in law, goes to the "same question" element of *res judicata*. If there has been a change in fact or law then the question in the previous decision cannot be the same question as that now before the tribunal. (3) The finality of Board decisions. Do the powers of reconsideration in s.106(1) of the Act support an argument that no Board decision is sufficiently final to satisfy the criterion of finality which is a condition precedent to the application of *res judicata*? The Board has had little difficulty in disposing of this point. In *Canadian General Electric Company Limited*, *supra*, at 388, the Board stated:

15. The Board's use of a doctrine analogous to *res judicata* is not inconsistent with its power to reconsider its own decisions. Board decisions may be distinguished from the type of decision cited by Bower and Turner, *supra*, at pp. 132 and 138 where subsequent revisions based on changing circumstances between the parties may be found to cause a want of finality for the purposes of *res judicata*. An example of this type of decision would be certain matrimonial orders whereby the amount of alimony or maintenance is periodically revised in view of subsequent developments between the parties. The majority of consideration cases before the Board relate to the state of things prior to the Board's hearing rather than to subsequent events. Because of the importance of enabling parties to rely on Board decisions as final decisions, the Board does not normally assume the role of an ongoing guardian of the equities of a decision or remedy.

And, at 389:

16. Furthermore, and perhaps most importantly, the Labour Relations Act itself makes it clear that the decisions of the Board are to be considered final and binding even though they may be revised. Section 95(1) [now 106(1)] provides,

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and *the action or decision of the Board thereon is final and conclusive for all purposes*, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

[emphasis added]

17. Accordingly, because the Board has set a strict standard for reconsideration and because the Act clearly indicates that its decisions are to be considered final and binding unless and until revised, the Board is satisfied that the Board's powers under section 95(1) [now 106(1)] of the Act raise no want of finality and that a doctrine analogous to *res judicata* is properly applicable to the Board's decisions.

See, also *Arnold Markets Limited* (1962), 62 CLLC ¶16,221 at 992; *Holland River Garden Company Ltd.* (1964), 64 CLLC ¶16,304 at 1256 and *Tandy Electronics Ltd.* (1980), 102 DLR (3d) 126 (Div. Ct.). (4) Does an argument based on the finding in *McGregor v. McGregor*, *supra*, that *res judicata* applies only to the decision itself and not the grounds on which the decision is based, bar an application of the *in rem* doctrine? It could be argued that the "real" decision in the first decision was that, because of the operation of section 146(2) of the Act on the finding that Local 2693 was an affiliated bargaining agent, the collective agreement between the parties was null and void. The finding that Local 2693 was an affiliated bargaining agent and not an employee bargaining agency was the ground upon which the decision was based. If *McGregor v. McGregor*, *supra*, is followed then the applicant could not rely on the finding in the instant case. However, such a narrow reading of the first decision should not be allowed to defeat the public policy behind the doctrine of *res judicata*. There is sufficient judicial authority in *Foster v. Reaume*, *supra*, to defeat such an argument. (5) Policy considerations. Even though there are important reasons why the doctrine of *res judicata* should be applied, there are equally important reasons why the Board should not exercise its discretion. In *Oakwood Park Lodge*, *supra*, the Board said this in support of *res judicata*:

9. Although the Act does not expressly authorize the application of the doctrine of *res judicata*, there are strong practical and policy grounds for doing so. Rights and duties have meaning only if they are certain and relatively stable. Parties expect that a decision of the Board will clarify their legal relationship and put an end to the controversy between them. Board decisions would lose much of their value if they did not provide a reliable guide for the conduct or planning of the parties' affairs. Continuous litigation would undermine the harmonious relationship between the parties which the Act is designed to foster, and could give rise to abuse and harassment of a weaker party. It could also give rise to costly duplication, inefficient utilization of the Board's scarce resources, and a serious impediment to the effective administration of the Act. This potential consequence is especially serious in labour relations matters where "time is the essence" and finality is an important statutory objective. Moreover, from an institutional point of view, the prospect of relitigation greatly increases the possibility of inconsistent decisions which can only undermine the credibility of the adjudication system and the adjudicators. The doctrine of *res judicata* serves to minimize these possibilities, and is based upon the entirely reasonable expectation that if a judgment is rendered in an earlier case which is related logically to a subsequent proceeding, the former will be taken into account in resolving the latter. Indeed, this is the theory which underpins the development of the common law and the principle of *stare decisis*. Cases involving similar factual and legal questions should be decided in the same way, and if there is a close relationship in terms of the parties and issues involved, the interrelation-

ship of the two proceedings may legitimately preclude the relitigation of those issues already settled.

However, in the same case the Board made an equally compelling argument for a cautious application of the doctrine. Definitions of *in rem* and of *res judicata* have been fashioned and the Board stated at p. 1513:

...in a legal context entirely foreign to that which concerns the Board. We do not think that 19th century cases concerning, in many instances, the resolution of the property disputes or the devolution of estates, provide a very reliable source for the interpretation of The *Labour Relations Act*. Even the matrimonial cases do not provide an exact analogy; and it is interesting to note that the notion of an *in rem* determination has been described by the Supreme Court of Canada in *Sleeth v. Hurlbert* (1896), 25 S.C.R. 620 as a “harsh doctrine - a doctrine that may be used to the unjust destruction of individual rights and interests”. We were unable to find any case in which the Courts faced a situation identical to that now before us, but even if we had, it must be recognized that as a statutory tribunal with a mandate to administer a statute, monitor relations between employers and employees, and promote orderly collective bargaining, the Board might well have to approach the problem in a way that is different from that of the Courts. Moreover, at common law, it is clear that the Courts have been unwilling to extend the doctrine of *res judicata* even where the rationale underpinning the doctrine would appear to be applicable....In our view, despite the undoubted utility of the doctrine from an administrative point of view, its complexity and the need to harmonize its principles with the purposes embodied in The *Labour Relations Act*, fully justify a cautious approach in its application.

Essentially, the Board in *Oakwood Park Lodge, supra*, is arguing for a *res judicata*, restricted by the labour relations realities of each case. The doctrine of *res judicata* developed in areas and contexts of law entirely different from labour relations. The Board should therefore be cautious about an uncritical application of the doctrine.

14. In *Wright Assemblies Limited* 61 CLLC ¶16,215, the Board first discussed the possible application of the principle of *res judicata* to the decisions of the Board. In the following year the Board applied this principle in *Arnold Markets Limited, supra*, and has since applied this principle in several other instances. See, for example, the cases cited under the third heading in the preceding paragraph. While the analysis in *Canadian General Electric Company Limited, supra*, makes an argument *pro* and *contra* the application of the principle of *res judicata* to the decisions of the Board, we are strongly of the opinion that the principle ought to be applied to the decisions of the Board where the necessary conditions and safeguards are met. The first decision, notwithstanding its unpopularity with Local 2693, was made after thirty-seven days of evidence and argument. The issue of whether Local 2693 is an affiliated bargaining agent was exhaustively dealt with in the first decision. While Local 2693 argued that the applicant should be required to prove its case and that the other parties should have an opportunity to call evidence, there was no suggestion either that Local 2693 had in any way changed since the facts referred to in the first decision or that Local 2693 had any evidence or argument to present to the Board which it had not presented to the Board in connection with the first decision.

15. Having regard to the analysis of the principle of *res judicata* and to the component of *res judicata* known as *in rem* decisions, the Board finds that first decision that Local 2693 is an affiliated bargaining agent within the meaning of section 137(1)(a) of the Act and that Local 2693 may not lawfully represent construction labourers in the industrial, commercial and institutional sector of the construction industry is a decision *in rem*.

16. Having regard to the foregoing and pursuant to the provisions of section 135(2a) of the Act, the Board declares that the collective agreement between the General Contractors' Division of the Construction Association of Thunder Bay Incorporated and the Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America made on

December 17, 1986, is unlawful as an agreement or other arrangement other than a provincial agreement contrary to subsection 146(1) of the *Labour Relations Act*, R.S.O. 1980, c.228 as amended and accordingly is null and void and of no force and effect and is not binding upon the General Contractors' Division of the Construction Association of Thunder Bay Incorporated or any of its members.

17. The Registrar is directed to cause a copy of this direction to be filed exclusive of reasons in the prescribed form at the Office of the Registrar of the Supreme Court of Ontario.

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**1296-82-U; 0195-83-U Luciano D'Alessandro and Donato Marinaro, Complainants v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents**

**Duty of Fair Referral - Duty of Fair Representation - Remedies - Unfair Labour Practice**  
 - Union paying legal fees incurred by respondent in Board proceedings but not those of complainants  
 - No breach of fair representation duty - Board having no jurisdiction to act as watchdog over internal union processes - No circumstances to warrant departure from policy of declining to award costs  
 - Hearings protracted by both parties - Complainants' mixed success also militating against an award of costs

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *F. W. Murray* and *W. F. Rutherford*.

**APPEARANCES:** *John Bracewell* for Luciano D'Alessandro; *Ed J. Brogden* for Donato Marinaro; *A. M. Minsky* and *R. Leone* for the respondents.

**DECISION OF THE BOARD;** July 23, 1987

1. In a decision dated December 11, 1985 in respect of these consolidated complaints under section 89 of the *Labour Relations Act*, the Board found that the respondent Labourers' International Union of North America, Local 1089 (also referred to in this decision as the "Union" and "Local 1089"), contravened section 69 of the Act in respect of three of the six referrals impugned by the complainant Luciano D'Alessandro, and in respect of 23 of the numerous referrals impugned by the complainant Donato Marinaro, and ordered the Union to compensate the complainants for their respective wage and benefit losses. In paragraph 65 of that decision (which is reported in [1985] OLRB Rep. Dec. 1708), we wrote as follows regarding the complainants' request for costs:

65. Counsel for the complainants has asked the Board to award costs to his clients. That request was opposed by respondents' counsel, who noted that his clients were not asking for costs in the event that the complaint was dismissed. In rejecting a similar request by a complainant in *Silkknit Limited*, [1983] OLRB Rep. Nov. 1913, the Board wrote, in part, as follows:

8. We are not entirely unsympathetic to the complainant's concern, for we recognize that a party may well have to expend substantial sums in connection with proceedings under the *Labour Relations Act*. Moreover, there is something to be said for the argument that if one can obtain costs upon the vindication of private law rights, the measure of compensation for the successful assertion of public rights guaranteed by statute should be no less generous. However, there are a number of difficulties with this superficially attractive proposition. In the first place, costs are not dealt with explicitly

in the statute, with the result that it is arguable that the Board has no jurisdiction to award costs except as a part of the compensation award flowing from a finding of a statutory violation. Thus, there may be no authority to compensate a party respondent which has successfully resisted or defended against a claim. And how should one deal with a situation in which, from a practical or legal stand point, success is divided? The law of costs in the civil process is both technical and complex, and there are good policy reasons why it should not be readily imported into a law of collective bargaining which has survived without it for forty years and which the laymen who operate within the system and regularly appear before the Board have some difficulty understanding as it is. Finally, while it is tempting to suggest that flagrant or egregious violations of the statute should result in a "make whole" remedy in which the aggrieved party is compensated for the costs of the proceedings, it is much less clear how one would distinguish an "ordinary" violation of the statute from a "flagrant" one or a frivolous assertion from one which is arguable but ultimately rejected. It is one thing to suggest that a serious breach of the *Labour Relations Act* may trigger special remedial considerations or call for ingenuity in fashioning the appropriate remedy; it is quite another to suggest that an "ordinary" breach of the Act yields one level of compensation while a "serious" one warrants a higher level of compensation. Such an approach would begin to look "penal" rather than "compensatory" (and see sections 96 - 99 of the Act which are expressly penal in character).

See also *John Glykis*, [1985] OLRB Rep. March 420; *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1775; and *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at page 1271. In addition to the compelling policy reasons set forth in those decisions for not awarding costs in respect of complaints under section 89 of the Act, the complainants' mixed success in the present case also militates against an award of costs.

2. Since the parties were unable to reach agreement concerning quantification of the Board's order, a further hearing was held for the purpose of hearing the evidence and submissions of the parties regarding that matter. In a decision dated July 30, 1986 (reported in [1986] OLRB Rep. Aug. 1058), we rejected Mr. Marinaro's claim for over \$70,000 in damages, and awarded him \$17,899.03, plus interest. A majority of the panel also rejected Mr. D'Alessandro's claim for over \$45,000 in damages, and awarded him \$6,005.98 plus interest. The respondent was also ordered to make on behalf of Messrs. Marinaro and D'Alessandro all payments to the welfare, dental, and pension funds which would have been directed to those funds, in amounts corresponding to further earnings of \$17,899.03 and \$6,005.98, respectively. (In a decision dated August 27, 1986, Board Member Rutherford concurred with the majority decision dated July 30, 1986 insofar as it pertained to Mr. Marinaro, but dissented from the majority decision to award compensation to Mr. D'Alessandro.)

3. In an unreported decision dated November 19, 1986, the Board dismissed an application by the complainants for reconsideration of various aspects of the July 30, 1986 decision. With respect to the complainants' request for reconsideration of the ruling (contained in the aforementioned decision dated December 11, 1985) by which we declined to award costs to the complainants in these proceedings, we wrote as follows:

4. Having regard to all of the circumstances, we are prepared, however, to afford the parties an opportunity to present evidence and further argument concerning costs. Accordingly, the Registrar is hereby directed to list these consolidated complaints for continuation of hearing in Sarnia for the purpose of hearing the evidence and representations of the parties with respect to the issue of whether or not costs should be awarded to the complainants in these proceedings.

4. Pursuant to that direction, a further hearing was held in Sarnia on July 2, 1987. At that hearing, counsel for the respondents raised a preliminary objection to the Board's jurisdiction to award costs, and further submitted, in the alternative, that the complainants have not made out a

*prima facie* case for an order for costs in their favour. Having carefully considered all of the submissions of the parties regarding those matters, we have reached the following conclusions.

5. The complainants seek to obtain costs from the respondent on several bases. They contend that various resolutions passed by the membership and Executive of Local 1089 obligate the Union to pay the complainants' costs. They further allege that Local 1089 has discriminated against them, and dealt with them in bad faith and in an arbitrary manner, by paying legal fees incurred by the respondent Rocco D'Andrea and his successor, Robert Leone, but declining to pay theirs. Indeed, Mr. Bracewell, who represented Mr. D'Alessandro at the July 2, 1987 hearing, sought to file at that hearing a new complaint under section 89 of the Act alleging that the respondents contravened section 68 of the Act by refusing to pay Mr. D'Alessandro's legal expenses pursuant to two of those resolutions. However, as submitted by counsel for the respondents, the interpretation and enforcement of such resolutions are not within the Board's jurisdiction under section 68 of the Act. It is well established in the Board's jurisprudence that for the Board to find a breach of section 68, the union's impugned actions must involve the representation of a bargaining unit employee in relation to his or her employer. See, for example, *Angelo Moro*, [1983] OLRB Rep. Aug. 1354, at paragraph 3, in which the Board wrote, in part, as follows:

.... The Board has consistently ruled in past decisions that the duty of fair representation in section 68 is concerned only with the representation by a trade union of an employee in relation to his or her employer.

This Board has only such jurisdiction as has been conferred upon it by statute. It has no authority under section 68 of the *Labour Relations Act* (or any other statutory provision) to undertake a general watchdog role in respect of internal union processes. Nor does the Board have any general authority to supervise or direct the expenditure of union funds; that is the responsibility of the union membership, either directly or through their elected representatives. Moreover, the Board observed in *Arthur Joseph Roberts*, [1974] OLRB Rep. March 169, at paragraph 8:

... the propriety of a trade union's behaviour vis-a-vis its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member to the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the Courts are his assurance that these rules will be implemented fairly and impartially.

See also *Ronald Lewszoniuk*, [1984] OLRB Rep. Jan. 48; *Sylvia Colalillo*, [1982] OLRB Rep. July 1066; and *Frank Manoni*, [1981] OLRB Rep. Dec. 1775. Thus, the allegations contained in Mr. D'Alessandro's new complaint do not, in our opinion, make out a *prima facie* case of a breach of the *Labour Relations Act*, and should be dismissed without a hearing pursuant to section 71(1) of the Board's Rules of Procedure.

6. Counsel for the complainants also contended that the existence of those motions and the complainants' (alleged) reliance on them should prompt the Board to award costs to the complainants. However, in our view, neither those motions nor any of the other circumstances relied upon by counsel for the complainants warrant a departure from the Board's well established policy of declining to award costs. As noted by the Board in *Gerald Lecuyer*, [1987] OLRB Rep. Apr. 529, at paragraph 32, "[t]his Board has repeatedly said that if it does have the power to award costs to a successful complainant, it would be inappropriate to exercise that power where there is no corresponding power to award costs against an unsuccessful complainant: see, for example, *Silknet Limited*, [1983] OLRB Rep. Nov. 1913 at paragraph 8." See also *Fitzhenry and Whiteside Limited*, [1987] OLRB Rep. Apr. 504, at paragraph 14. In this regard, we find no merit in Mr. Bracewell's argument that section 80(4) of the *Judicature Act*, R.S.O. 1980, c. 223 (which was in force at the time these complaints were filed), gives the Board jurisdiction to award costs to a successful com-

plainant and against an unsuccessful complainant. It is clear from the provisions of the *Judicature Act*, read as a whole, that it was not intended to apply to the Board, and that we are not “judicial officers” within the meaning of section 80(4), which provides that “[c]osts of proceedings before judicial officers, unless otherwise disposed of, are in their discretion, subject to appeal.” (It is common ground among the parties that nothing in the *Courts of Justice Act*, S.O. 1984, c. 11, as amended, which superseded the *Judicature Act* on January 1, 1985, gives the Board any such jurisdiction.)

7. In *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, at paragraph 48, the Board, as part of a “make whole order”, directed the employer to reimburse the union involved in those proceedings for “all reasonable organizational, bargaining, legal and other expenses associated with its efforts to acquire and pursue its statutory rights”, including “the costs of proceedings before the Board”. In that case, the employer had closed its Call Answering Service Division in order to “rid itself, once and for all, of the union and its supporters” (see paragraphs 29 to 34). However, in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (in part (d)(i) of paragraph 125), the Board declined to award legal costs in the context of proceedings involving a pervasive pattern of unfair labour practices, including violations of what are now sections 15, 64, 66, 67, and 70 of the Act. In doing so the Board wrote:

We have decided against awarding the Complainant its legal costs in this matter. The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successfully defend against complaints may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time.

Since then, the Board has been asked on a number of occasions to review and alter that policy (see, for example, *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401; *Jean Liebman*, [1986] OLRB Rep. June 753; *Gerald Lecuyer*, *supra*; *John Glykis*, [1985] OLRB Rep. March 420; *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755; and *Grey-Owen Sound Health Unit*, [1980] OLRB Rep. Feb. 223. On each such occasion, the Board has declined to do so on the basis of labour relations policy considerations, including those articulated in the passage quoted above from *Silknit Limited*, [1983] OLRB Rep. Nov. 1913, at paragraph 8. The *Silknit* case involved a successful complaint by a trade union against an employer. However, similar requests have also been uniformly denied in the context of section 89 complaints in which the Board has found a trade union to have violated section 68 or 69 of the Act: see, for example, *Gerald Lecuyer*, *supra*, and *Angelo Ritrovato*, *supra*.

8. As noted in paragraph 65 of our decision dated December 11, 1985 (as quoted above), the complainants’ mixed success in the instant case also militates against an award of costs. Less than half of the numerous referrals impugned by Mr. Marinaro were found to have involved a contravention of the Act, and he was ultimately found to be entitled to less than a third of the damages which he claimed. Mr. D’Alessandro’s complaint was also only partially successful; three of the six referrals impugned by Mr. Marinaro were found to have been made in contravention of the Act, and he was awarded only a small fraction of the damages which he was claiming.

9. The complainants contend that their costs were escalated by various actions of the respondents. For the purposes of this decision, we are prepared to assume (without deciding) that, as alleged by the complainants, various actions of the respondents, such as requesting adjournments, engaging in settlement discussions involving other complainants, and making various motions before the Board, did escalate the complainants’ costs. However, it is clear that various actions of the complainants, through the various counsel who represented them at the pertinent times, also increased the costs of these proceedings for all parties by protracting the hearing of these complaints. For example, on August 9, 1984, during the course of the hearing of the complainants’

case, the complainants alleged that one of their witnesses had been "jumped" on the Union's out-of-work list in an attempt to intimidate him. That allegation, which the Board ultimately found to be without merit (in an unreported decision dated October 5, 1984), interrupted the hearing of the merits of these complaints, and gave rise to five days of hearing, followed by written argument. The complainants' belated filing of particulars also prolonged the hearing. It was further prolonged by counsel for the complainants' failure to appreciate or respect the proper limits of reply evidence: see, for example, our decision dated February 14, 1985 (reported in [1985] OLRB Rep. Feb. 241). We could multiply examples of the ways in which the hearing of these matters was prolonged by various actions of the parties and their representatives, but consider it unnecessary to do so. It suffices to observe that the protraction of the hearing of this matter is attributable to the complainants as well as to the respondents. In the totality of the circumstances, we are of the view that neither the prolongation of the hearing nor the aforementioned escalation of costs warrants a departure from the Board's normal practice of declining to award costs.

10. For the foregoing reasons, the requests by each of the complainants that the Board reconsider its aforementioned decision in respect of costs are hereby dismissed.

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**1692-85-U John Daniell, Complainant v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent**

**Duty of Fair Representation - Unfair Labour Practice - Union implementing a pension plan over the objections of most of the employees who would be covered by the plan - Union entitled to adopt a course of action other than that favoured by most employees once views of employees taken into account - Reasonable for union to conclude that long-run interests of bargaining unit members as a whole would benefit from the introduction of a pension plan - No breach of fair representation duty**

**BEFORE:** *Ian Springate*, Vice-Chair.

**APPEARANCES:** *John Daniell, Frank Kidson and Carl F. Smith* for the applicant; *Harold F. Caley and Albert Marinelli* for the respondent.

**DECISION OF THE BOARD;** July 2, 1987

1. At the commencement of the hearing into this matter, the complainant agreed with counsel for the respondent that the proper respondent was the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and not, as originally listed in the style of cause, Albert Marinelli and Bruno Teichmann. The style of cause in the complaint has been amended accordingly.

2. This is a complaint in which it is alleged that the respondent breached its obligations under section 68 of the *Labour Relations Act* by implementing a pension plan over the objections of most of the employees who would be covered by the plan. The respondent does not dispute that a majority of employees opposed the introduction of the pension plan. It contends, however, that notwithstanding this fact, the implementation of the pension plan did not violate section 68. Section 68 provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

3. The complainant is a truck driver employed in the construction industry by Ontario Hydro. Ontario Hydro and certain other construction employers belong to the Electrical Power Systems Construction Association ("EPSCA"), which engages in collective bargaining on their behalf. The bargaining rights with respect to truck drivers and warehousemen employed by members of EPSCA are held by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The International does not, however, bargain directly with EPSCA. Rather, negotiations are conducted through a council of international unions known as the Allied Construction Trades Council. Collective agreements negotiated between EPSCA and the Allied Construction Trades Council consist of a master portion and a series of appendices, one of which relates exclusively to members of the Teamsters Union.

4. The practice has been for collective agreements entered into by EPSCA and the Allied Construction Trades Council to be ratified by the Council itself and not by individual employees covered by the collective agreement. The *Labour Relations Act* does not require ratification votes among employees, and the complainant does not allege that the failure to conduct such votes is unlawful. The fact that collective agreements entered into by the Allied Construction Trades Council are not ratified by employees, however, does help explain how a negotiated pension plan could be implemented over the objection of most of the employees covered by it.

5. The objection of employees to a pension plan is easily understood in the context of the construction industry. In negotiations, employers are generally concerned with the total hourly rate for employee wages and benefits. When money is set aside for health, welfare and pension plans, it generally results in a corresponding reduction in the hourly wage rate. The pension plan referred to in this decision was described to employees as being totally funded by employer contributions. While in a technical sense that is true, it is easy to understand the complainant's view that the funds in question actually come from himself and other employees.

6. The complainant has been employed by Ontario Hydro since 1973. He is 57 years of age. No direct evidence was led as to the complainant's financial situation, although Mr. Marinelli, a witness called by the union, described him as a person who knows how to handle his money. During the hearing, the complainant made reference to several aspects of the pension plan which he felt were wanting. The complainant acknowledged, however, that throughout the events leading up to the filing of the complaint as well as in the instant proceedings, his goal has not been to improve the pension plan but rather to get rid of it. It is his contention that if money must be set aside for employee retirement purposes, the money should be paid into a registered retirement savings plan under the control of each employee. The complainant acknowledges that under such a scheme some employees, the foolish ones in his view, might simply withdraw the money and spend it.

7. Although a number of union officials favoured the introduction of a pension plan, two individuals were primary responsible for the actual introduction of a plan. They were Albert Marinelli, the Central Region Director of the Canadian Conference of Teamsters and a representative of the International Union, and Bruno Teichmann, the president of Teamsters Local Union No. 230. Although the bargaining rights for truck drivers and warehousemen employed by members of EPSCA are held by the international union, the direct employees of Ontario Hydro belong to Local 230. Mr. Marinelli and Mr. Teichmann both testified that they believed it to be in the best interests of employees that they be covered by a pension plan rather than risk many of them reach-

ing retirement age without any form of security other than the standard government payments. They also testified that they expected employee opposition to the introduction of a pension plan, but felt that employees would in time recognize the benefits of having a plan. Both Mr. Marinelli and Mr. Teichmann had prior experience in the introduction of a pension plan over employee opposition. Mr. Teichmann when a pension plan was introduced to cover ready-mix employees belonging to Local 230, Mr. Marinelli when a plan was introduced to cover employees engaged in the freight industry. Mr. Marinelli testified that when he initially proposed the idea of a pension plan for freight industry employees, he was booed off the floor of a union meeting, although the plan in question has since become accepted by employees.

8. Mr. Marinelli took responsibility for negotiating with EPSCA the collective agreement language necessary to ensure employer payments into a pension fund. Mr. Marinelli also investigated the various types of plans that could be utilized. His investigation included discussions with the Teamsters Canadian Pension Plan, which despite its name primarily covered employees in British Columbia. Mr. Marinelli also spent some time dealing with employee concerns related to the introduction of a pension plan. It was Mr. Teichmann, however, as president of Local 230, who had the most contact with employees. He continually sought to justify the idea of a pension plan to employees, and once the terms of a plan were agreed upon, to explain it to them. Mr. Teichmann continued to support the plan even after being presented with a petition in opposition to it signed by a majority of employees covered by the plan. It should be noted that neither Mr. Marinelli nor Mr. Teichmann ignored employee opposition to a pension plan. Given the opposition, they concluded that initial payments into, and accordingly the benefits from, the plan should be quite modest. It was their expectation that once a plan was established and operational, contributions into the plan could be progressively increased, as could the benefits.

9. Mr. Teichmann's steadfast support for a pension plan is of particular interest given that he is an elected official of Local 230. Although the local's membership is not restricted to employees of Ontario Hydro, the approximately 300 members who are employees of the company presumably make up a significant portion of the local's total membership. In elections held in late 1985, Mr. Teichmann initially appeared to have lost his position as President to Mr. Goreman, a rival candidate. Mr. Goreman, in fact, assumed office. After the counting of certain ballots which had been segregated pending a ruling on whether they should be counted, however, Mr. Teichmann was declared the winner and he resumed office in April, 1986.

10. The first practical step towards implementing a pension plan occurred in 1982 during negotiations between EPSCA and the Allied Construction Trades Council. Mr. Marinelli proposed, and EPSCA agreed, that employers belonging to EPSCA remit 10 cents per hour for each hour worked by Teamster employees to a pension fund. In that no pension plan had yet been established, it was also agreed that the money would initially be held in trust. Mr. Marinelli then attended two meetings of employees, one in Toronto and one near Ontario Hydro's Bruce generating station, to explain what had been agreed to. At the meeting in Toronto Mr. Marinelli encountered a great deal of hostility. Mr. Marinelli also had discussions with a number of firms and organizations about having employees of EPSCA companies either covered by a new pension plan, or joining an existing plan. Mr. Marinelli eventually concluded the best approach would be to join the Teamsters Canadian Pension Plan, a decision endorsed on January 26, 1983, by the Teamsters construction council. The pension plan in question is administered by The Wyatt Company, a firm of actuaries and consultants, from its office in Vancouver. Control over the plan is exercised by trustees appointed by both employers and the union. On or about May 16, 1983, Mr. Teichmann was appointed one of the trustees.

11. The respondent called as a witness Mr. Bruce Rollick, an actuary who is Vice-President

of The Wyatt Company and Manager of its Vancouver office. Mr. Rollick testified that the Teamsters Canadian Pension Plan, which was established in 1981, is designed to cover employees of a number of employers. It has a cost separation factor which ensures that one group of employees does not pay for the pensions of another. The plan is structured so as to allow for low initial contributions on behalf of a group of employees, with the understanding that contributions will increase over time. Initially the plan covered only employees in British Columbia. In March, 1982, however, certain brewery workers in Ontario came under the plan and accordingly it was then registered with the Ontario Pension Commission. According to Mr. Rollick, the plan has certain standard provisions, as well as other provisions which can be modified depending on the circumstances of each particular group, including the level of contributions. Mr. Rollick testified that benefits under the plan are structured to ensure that benefits paid to older employees far exceed their contributions. He also testified, however, that younger employees would be better off if they could take an amount equivalent to what is being contributed to the plan on their behalf and invest it in a registered retirement savings plan. Mr. Rollick further acknowledged that the benefits currently payable under the plan are on the whole not very generous. He explained that this is due to the relatively low level of contributions into the plan.

12. In January, 1984, a meeting of employees was held in Ajax at which time Mr. Teichmann explained the outline of the pension plan as it would apply to employees of EPSCA companies. In April of that year a pamphlet explaining the terms of the plan in some detail was distributed to employees. Following the distribution of the pamphlet, the complainant organized a petition in opposition to the plan. The petition, which was signed by approximately ninety per cent of the employees covered by the plan, was forwarded to Mr. Teichmann. Mr. Teichmann responded by organizing two further meetings of employees, one on March 31, 1985, in Toronto, the other on April 1, 1985, at Underwood. Mr. Marinelli and Mr. Teichmann attended both meetings. Mr. Rollick attended the Toronto meeting, while Mr. Martin Brown of The Wyatt Company's Toronto office attended the meeting in Underhill. The Toronto meeting lasted in excess of three hours. Most of the time was taken up with Mr. Rollick explaining the pension plan and answering questions from employees, including questions related to registered retirement savings plans. At one point during the meeting Mr. Marinelli acknowledged that had employees been given an opportunity to vote on the pension plan, they likely would have voted against it.

13. In January, 1986, during the period when Mr. Goreman served as president of Local 230, two meetings were held of employees at which those present voted in favour of withdrawing from the pension plan. No actual results flowed from the vote, presumably due to the fact that bargaining rights are held by the International Union and not by Local 230.

14. Although contributions to the pension plan were originally calculated on the basis of ten cents for every hour worked, the amount involved was increased to twenty cents in 1983, thirty cents in 1984 and forty-five cents in 1985. In consequence of the increased level of funding there have also been improvements to certain benefits under the plan.

15. The complainant contends that the implementation and continuation of the pension plan over the wishes of employees is a violation of section 68. He requests that the Board order that the plan be revoked and that funds held by the plan be placed in individual registered retirement savings plans. It is the complainant's contention that the plan was introduced simply to allow the union to gain control over money held in the pension fund. There is nothing in the evidence which supports this contention. Further, nothing in the evidence suggests that Mr. Marinelli or Mr. Teichmann were motivated by ill will. They acted in what they believed to be the best interests of employees. They did so openly without trying to mislead anyone. Accordingly, the real question in these proceedings is whether it was open to Mr. Marinelli and Mr. Teichmann, and through them

the union, to introduce the pension plan and negotiate employer contributions to the plan over the objections of a majority of employees.

16. The respondent trade union is the legal bargaining agent of the employees. Its status, however, is quite different from that of an agent in a commercial context. In particular, it is not required to implement the views of a majority of employees as though they were its principals. Rather, it negotiates and enters into collective agreements as an independent contracting party. See: *Syndicat Catholique v. Cie Paquet Ltee* (1959) 18 D.L.R. (2d) 346 (S.C.C.). The union is entitled to take into account its own institutional concerns as well as what it believes to be in the best interests of employees in the bargaining unit. See: *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421, and *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309. In my view, the prohibition against arbitrary conduct in section 68 requires that a union take into account the views of employees. Once it has done so, however, the union is entitled, in light of other relevant considerations, to adopt a course of action other than that favoured by most employees. Although in the instant case certain employees, including possibly the complainant, could obtain a higher personal return on money now being contributed to the pension fund on their behalf, other employees closer to retirement stand to benefit from the plan. In addition, it is reasonable to assume that many younger employees would not, in fact, invest the money for their retirement years if they had immediate access to it. Given these considerations, it was reasonable for the respondent to conclude that the long-run interests of bargaining unit employees as a whole would benefit from the introduction of a pension plan, and that one should be implemented even over the objection of the employees themselves. The decision was not prompted by bad faith or a discriminatory intent or made in an arbitrary fashion. Accordingly, no breach of section 68 has been made out.

17. The Board orally dismissed this complaint at the conclusion of the hearing. That ruling is hereby affirmed.

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**0272-87-R** Charlene Banwait, Balbir Kler, Sarbjit Sidhu, et al, Applicants v. Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent v. **Easy Enterprises Inc.**, Intervener

**Fraud - Termination - Applicants alleging that employees intimidated into signing membership cards during organizing drive - Allegations not constituting fraud - Meaning of fraud should not be expanded to include charges which can be filed under other sections of the Act - Application dismissed**

**BEFORE:** *Patricia Hughes*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Sarra*.

**APPEARANCES:** *Charlene Banwait*, *Balbir Kler* and *S. Virk* for the applicants; *Bernard Fishbein*, *Richard McNaughton* and *Fernando da Silva* for the respondent; *S. A. Bernofsky* and *D. H. Peirce* for the intervener.

**DECISION OF THE BOARD;** July 28, 1987

1. The applicants herein seek a declaration under section 58 of the *Labour Relations Act* ("the Act") that the respondent union no longer represents the employees in the bargaining unit.

2. The applicants allege that a supervisor of the intervener employer was involved in the union's organizing drive and was a collector of membership cards. Employees, they say, were intimidated into signing cards. The applicants' representative says she both trusted the supervisor and his negative comments about the employer, because he was a supervisor, and, at the same time, was intimidated by him and fearful of losing her job if she did not sign a card.

3. Counsel for the respondent argues that those allegations do not constitute fraud under section 58 of the Act and therefore seeks to have the application dismissed without an inquiry into the merits. He adds, further, that these allegations, if they constitute a breach of the Act, belong more properly under section 13 of the Act as alleging employer involvement in the union. As such, he continues, they are untimely since the union was certified on September 5, 1986 and the events being alleged were known to the applicants' representative at that time. Counsel notes that the allegations concern an individual who had been included by the employer on Schedule A of the list of employees the employer believed to be in the bargaining unit proposed by the union in its certification application. Moreover, the intervener employer had brought similar charges against the union on December 19, 1986, although they were subsequently withdrawn in a settlement with the union. Counsel for the respondent suggests that these similar allegations are now clothed as allegations of 'fraud' under section 58 because a termination application brought under any other termination section would be untimely by virtue of subsection 57(1) and section 61 of the Act.

4. Section 58 states as follows:

If a trade union has obtained a certificate by fraud, the Board may at any time declare that the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration, the trade union is not entitled to claim any rights or privileges flowing from certification and, if it has made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.

It is clear that "an alleged fraud leading to a Board certificate can be raised at any time": *Ontario Taxi Association 1688*, [1981] OLRB Rep. Sept. 1280. Thus no question of timeliness arises here (and is not raised by the respondent insofar as the section 58 application is concerned).

5. The meaning of "fraud" under section 58 involves evidence, documentary or oral, before the Board at the time of certification: "it must be demonstrated that a false representation was made to the Board which the Board relied on and also that the representation was known, or ought reasonably to have been known by the purveyor thereof to be false": *Ontario Taxi Association 1688*, *supra*. For example, a representation that a card was signed by "A", an employee thus claimed to be a member of the union, when it was not signed by "A", if known to the person making the representation to the Board, constitutes "fraud" within the meaning of section 58.

6. We are satisfied that even if proved, the allegations raised by the applicants would not constitute fraud within the meaning of section 58. The Board indicated as much in *229704 Contracting Ltd.*, [1971] OLRB Rep. June 337 which involved similar allegations:

9. The respondent [employer] alleged that its allegations constituted fraud and could therefore be raised at any time. The allegations referred to various alleged incidents wherein an officer of the applicant is said to have told the respondent's employees that the respondent wanted them to join the union and that those who did not would lose their jobs. In our opinion such conduct is covered by the term "improper or irregular conduct" in section [72] of the Board's Rules of Procedure and does not constitute fraud.

7. We agree with counsel for the respondent that the meaning of fraud in section 58 should not be expanded to include charges which can be filed under other sections of the Act. Allegations of employer involvement in the formation of a trade union or its administration and of intimidation and coercion in the collection of membership evidence can clearly be filed under other sections of the Act, section 13 and section 70 respectively. We emphasise that we make no findings on the merits of these allegations under either of those sections; we do note, however, that any such charges brought now would raise concerns of timeliness.

8. Accordingly, we ruled orally that the application fails to make out a *prima facie* case under section 58 of the Act. In our oral decision, we explained to the applicants' representative, who was not familiar with procedure before the Board, that we would not hear the merits of the application because even if we found her complaints and allegations to be substantiated or "true" (and we stated that we are making no such finding one way or the other), they would not satisfy the test of fraud under section 58 of the Act, the section under which the application had been brought. We explained, further, that the Board will dismiss a case without considering the merits when considering the merits cannot result in a finding that the case has been proved, since there is no advantage to requiring the parties to expend time, money and effort in a hearing which cannot possibly have a successful result for the applicants, as here.

9. For the above reasons, we dismissed this application at the hearing.

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**2644-85-M Grey Bruce Regional Health Centre, Applicant v. Ontario Nurses' Association, Respondent**

**Employee Reference - Practice and Procedure - Whether nurse clinicians in hospital excluded from unit by section 1(3)(b) - Application date in January and officer's inquiry in September and December - Passage of time not warranting departure from Board practice of determining duties and responsibilities as of application date - Management style in health care field reviewed - Nurse clinicians not employed in a confidential capacity nor exercising managerial functions**

**BEFORE:** *Patricia Hughes*, Vice-Chair, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

**DECISION OF PATRICIA HUGHES, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG;** July 6, 1987

1. This is an application under subsection 106(2) of the *Labour Relations Act* ("the Act") in which the applicant Grey Bruce Regional Health Centre ("the Hospital") requests that the Board determine that nurse clinicians (or "NCs") employed by the Hospital are excluded from the bargaining unit by virtue of paragraph 1(3)(b) of the Act. The respondent Ontario Nurses' Association ("the Association" or "the ONA") contends that the nurse clinicians are members of the bargaining unit.

2. We note that the Board's task is limited to determining whether the disputed individuals are "employees" within the meaning of the Act, not whether they are members of the bargaining unit, and that our determination is based on the report of a Labour Relations Officer who was

appointed by another panel of this Board "to inquire into the duties and responsibilities of the disputed individuals".

3. The name of the applicant is amended to read "Grey Bruce Regional Health Centre".

4. This application arose when the Association filed a grievance under the collective agreement between it and the Hospital complaining that dues for the nurse clinicians had not been remitted to the Association. The Hospital seeks clarification of the status of this classification which it claims has been excluded from the bargaining unit under the collective agreement since the inception of the classification in August 1982. The collective agreement does not explicitly exclude nurse clinicians, but rather excludes charge nurses and those above that rank.

5. In accordance with the Board's usual practice with respect to applications under subsection 106(2) of the Act, the Board appointed an Officer to inquire into and report back to the Board on the duties and responsibilities of the disputed individuals. The transcript of the examination, in which the Officer and counsel for both parties asked questions, was reproduced in the Officer's report. Neither party sought a hearing at which they might make representations with respect to the report and our decision is consequently based on the written submissions of the parties.

6. During the Officer's inquiry, two matters arose which must be dealt with prior to consideration of the main question before us. The first is that the Hospital sought to adduce evidence of the duties and responsibilities of the nurse clinicians after the application date of January 2, 1986; the second is that the Hospital requested the Officer to call Colleen Small as a representative witness. The ONA objected to both requests. The parties agreed that the parties could adduce evidence with respect to the duties and responsibilities both before and after January 2, 1986, subject to the Board's determination respecting the admissibility of the post-January 2, 1986 evidence. The Officer ruled that Colleen Small would not be called as a Board witness since she was not in the classification in dispute on the date of application. The Hospital objected to that ruling and called Colleen Small as its own witness.

7. With respect to the first preliminary issue, we are not satisfied that the passage of time since the application date (January 2, 1986) and the dates of the inquiry (September 18 and 19 and December 8 and 9, 1986) warrants a departure from the Board's normal practice of determining duties and responsibilities as of the application date. Consistent use of that date permits all parties to assess their position and to acquire necessary evidence in the most expeditious manner possible. Furthermore, the applicant did select the application date: it presumably was of the view that there was sufficient evidence as of that date to show that the nurse clinicians exercise managerial functions and are employed in a confidential capacity in matters relating to labour relations (and, indeed, the Hospital so states in its submissions and Karen Croker, one of the representative witnesses, testified that there was no difference in her responsibilities before and after January 2, 1986). We rule the evidence adduced of the duties and responsibilities of the nurse clinicians after January 2, 1986 inadmissible; accordingly, our decision is based on the evidence of the duties and responsibilities of the nurse clinicians as of the date of application, January 2, 1986.

8. In our view persons called as representative witnesses in subsection 106(2) applications must have been performing in the classification in dispute as of the date of application. Colleen Small had been a nurse clinician until June 1985, but ceased working in that classification at that time. The two witnesses called by the Officer as representative of the persons in dispute, Glenna Nixon (a nurse clinician since June 1985) and Karen Croker (in the position since September 1985), were nurse clinicians on January 2, 1986 and as such were in the classification in dispute on the application date. Colleen Small was not. We uphold the Officer's ruling refusing to call Colleen

Small as a representative witness. We note that the Hospital called Ms. Small as its witness and we have considered her testimony in that context.

9. In its written submissions, the Hospital also raised the question of onus. We have not been required to apply the onus in order to determine this matter and therefore have not been required to determine which party has the onus.

10. We find that the nurse clinicians are not employed in a confidential capacity in matters relating to labour relations. In *The Schneider-Link Office Employees' Association*, [1987] OLRB Rep. March 381, the Board stated that the purpose of the second branch of the paragraph 1(3)(b) exclusion is that "the employer can know that its internal strategies and communications are known and handled exclusively by persons of undivided loyalty (see *Town of Gananoque*, [1981] OLRB Rep. July 1010). Access to information which may be 'confidential' in a general sense is not, by itself, sufficient to exclude an employee from the application of the Act. What is important is not the confidentiality of the information, but rather its *labour relations content and potential collective bargaining use*" (emphasis in original). There is no evidence here that the nurse clinicians are privy to or deal with information which is relevant to the Hospital's "collective bargaining strategy or other sensitive labour relations information", except perhaps peripherally at meetings attended by the nurse clinicians at which policies and the administration of the collective agreement might be discussed. The nurse clinicians also have access to personnel files. That does not constitute "a regular, material involvement in matters relating to labour relations to justify a finding excluding a person from the operation of the Act.... The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise": *York University*, [1975] OLRB Rep. Dec. 945.

11. The more critical aspect of section 1(3)(b) here is whether the nurse clinicians exercise managerial functions. Although the Act does not specify criteria determining "managerial" functions, the Board has developed some general principles and guidelines which can be applied to the facts of a particular case. For example, in *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396, the Board refers to *Inglis Limited*, [1976] OLRB Rep. June 270 as

recognizing that the exercise of managerial functions may assume different forms [and states that it] identifies two benchmark situations - one where there is direct influence upon the employment relationship, and one where the influence upon the employment relationship is only indirect. These situations, of course, are only benchmarks and there is the possibility of many variations between them, but they do serve to explain the different approaches taken by the Board. It can be said, therefore, that, the more indirectly the exercise of a person's job responsibilities influences the employment relationship of others, the more the Board looks to independent decision-making as the criterion for identifying that person as management. Conversely, the more directly the exercise of a person's job responsibilities influences the employment relationship of others, the more the Board looks to effective control or authority over other persons as the criterion.

On these criteria, then, to the extent that the nurse clinicians indirectly affect the employment relationship of other nurses, the Board will be concerned about how independent the relevant decision-making is; to the extent the nurse clinicians directly affect the employment relationship of other nurses, the Board will be concerned about the nature of the authority exercised by the nurse clinicians over the other nurses. For example, although the nurse clinicians are involved in evaluation or assessment of nurses' performance, that evaluation is done in conjunction with the Patient Care Manager (PCM) (whom the parties apparently do not dispute is managerial); however, either the PCM or the NC may sign the evaluation. On the other hand, although there is some evidence that the nurse clinicians may make recommendations about hiring or the continuation of probation

or similar matters, they have no employees reporting directly to them (however, we note that where such recommendations have been made, they appear to have been followed; nevertheless, the board has not found the assessment of probationary employees to be of much assistance in determining whether a person exercise managerial functions: *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199).

12. The Board recognizes that management style in the health care field is not the same as in the more traditional industrial sector and it has taken the differences into account in assessing whether a position in the health care field is managerial in fact. The difficulty which arises from this difference in style is that decision-making in hospitals may be more diffuse and “democratic”, with input from more people, than would be the case normally in the industrial area. The Director of Nursing at the Hospital, Sandra McNeill, testified that the nurse clinician position was created in an effort to “decentralize” management. It was established when it was decided that the two functions of a head nurse, administrative and clinical, should be performed by two persons. The Patient Care Manager was to be responsible for the administrative functions and the nurse clinician for the clinical functions; on the Hospital’s organizational chart, the two positions are set side by side, both reporting to the Director. While it is always necessary to balance the employer’s style of management with the rights of employees to engage in collective bargaining in these cases, the task is particularly important in cases such as the instant case. The Board’s concern in such cases is dealt with at length in *Ottawa General Hospital*, *supra*, which also involved the status of “nurse clinicians”. The Board in that case indicated that it was “but the latest in a long series of cases where the Board has had to consider the status of registered nurses who were not primarily engaged in ‘hands on’ nursing care, but rather were performing a variety of teaching, co-ordinating, administrative and professional functions”. The Board issued a general cautionary note which applies in this case:

10. ... Modern business organizations - especially those employing professionals, - encourage the free flow of information and ideas from subordinates to superiors ... One should not conclude [...] however, that the existence of consultation, or an apparent “democratization” of decision-making, means that real managerial authority has percolated downwards. “Managerial” authority in the sense intended by the statute (i.e. authority of such character that it excludes the individual(s) from the terms of the Act) cannot be substantially diluted, diffused, dispersed, distributed or decentralized throughout an organization, without raising a question about whether these various participants in “collective” decision-making must necessarily all be excluded from the scope of the Act. An employer is entitled to structure his organization as he sees fit, but there is a limit on the extent to which he can unilaterally multiply the number of excluded persons by purportedly creating additional “foremen”, or by installing a process of management by committee....

• • •

12. In recent years, as collective bargaining has extended to technical and professional employees ..., the Board has to deal with increasingly complex job hierarchies and reporting structures. In a professional context, the members of the bargaining unit may well be highly trained and responsible persons who are largely self motivated, capable of exercising independent judgment, requiring little external direction in the performance of their regular duties and ultimately responsible to external regulatory *authorities*, *entirely independent of their employer*. As we have already mentioned, such direction as is necessary will often be generated internally through group discussion, evaluation by peers, or “collegial” modes of decision-making; and one should not expect the managerial structure appropriate for professionals to be the same as that for manual workers. The technical or professional employee will have a special relationship with management, with fellow professionals, and with the less skilled employees at lower levels on the job hierarchy.

Although the Board in that case found that the nurse clinicians were on salary and did not receive overtime and attended “some ‘management’ meetings which the other employees do not -

although not meetings to deal with specific employee grievances, collective bargaining negotiations, and so on", it found that they did not exercise managerial functions within the meaning of paragraph 1(3)(b) of the Act.

13. In *Royal Ottawa Hospital*, [1980] OLRB Rep. April 524, in which it determined that a newly created position of "Nursing Program Co-ordinator" was managerial, the Board considered twelve factors including whether the co-ordinator carried an assigned patient load, the amount of time the co-ordinator spent as a "resource" to other employees, responsibility for nursing coverage, scheduling of shifts, vacations and leaves of absences, responsibility in relation to grievances, responsibility for evaluation of other employees and the nature of benefits and other conditions of work.

14. The nurse clinicians at the Hospital do not act for management at any stage of the grievance procedure, and although they may be involved in discussions about grievances, particularly where they have been directly involved in the circumstances giving rise to the grievance, they do not make decisions with respect to grievances.

15. They are not involved in determining the master schedule, but prepare and post shift schedules; they recommend to the PCM whether the persons assigned are appropriate, as well as persons who would be (those recommendations are always accepted by the PCM). Complaints by nurses about the shifts they are on are made to the PCM. The NCs recommend that an employee should work overtime, but the employee is usually approached by the PCM. Employees wanting time off go to the PCM who asks the nurse clinician her opinion; the final decision is made by the PCM. The nurse clinicians do not schedule staff vacations.

16. They evaluate other members of the staff; the performance appraisal, for example, is made anecdotally in conjunction with the PCM and then a form is filled out, usually by the PCM, but sometimes by the nurse clinician, and signed by either; the PCM gives the nurse the evaluation; salary is not tied to the evaluation. However, their advice seems to be important in determining treatment of other employees. Although they may have input into the future of probationary employees, the Board had indicated that it does not give "much weight to assessments of probationary employees because it is not at all unusual for management to solicit a wide range of opinions from bargaining unit and non-bargaining unit employees concerning how a probationer is getting along, all of which are often weighed in the balance by someone other than the person expressing the view or making the assessments": *Ottawa General Hospital, supra*.

17. They have been involved in interviewing candidates, in conjunction with the PCM and another staff member, although usually the PCM and the NC would discuss whether someone should be hired without the presence of the other staff member. The PCM would inform personnel who would then inform the successful candidate. The NC has never been involved in writing or communicating otherwise to successful candidates. Karen Croker and Glenna Nixon both stated that they have not been directly involved in the discharge of an employee. They have not themselves disciplined an employee.

18. They attend regular monthly meetings of senior nursing staff at which matters of hospital policy are discussed, including the collective agreement and other policy matters, such as the development of new procedures; the weekly meetings of the Med-Psych group, for example, were defined by Ms. Nixon as "information sharing meetings". However, those meetings do not result in decisions affecting employees. Although grievances are discussed, the direction taken by management on grievances is not determined there.

19. The NCs are able to requisition supplies and can spend money without authorization up

to a certain point (to send someone to a conference, for example). They do not, however, determine the budget, they are involved in the transfer of employees from their units. They do not sign pay cheques and are not involved in salary disputes. They have offices of their own, as does the PCM.

20. The terms and conditions of their employment differ from those of the collective agreement; for example, they are paid on a salary, rather than hourly, basis and do not get paid for overtime, but can take time off in lieu; vacations are determined on a different basis.

21. In summary the nurse clinicians at the Hospital appear to play primarily a teaching or educative function. For example, they do sometimes care for patients, but during such time, they act as a role model for the other nurses (Karen Croker called this her "clinical practice" function and estimated she spent about 25% of her time on it. Glenna Nixon testified that she spends about 50% of her time acting "as a resource" to the nurses and registered nursing assistants under her direction; Karen Croker placed the percentage of her time spent in education and research at 30%). In this respect, reference to the job descriptions submitted as evidence, the last and most relevant one dated December 1985 is useful. That description refers to the nurse clinician position as a "staff position", saying

The Nurse Clinician is a staff position accountable for assisting in improving the quality of nursing care and enhancing the climate for learning within the philosophy and policies of the Division of Nursing. The Nurse Clinician share[s] with the Patient Care Manager accountability and authority for the clinical nursing management of his/her area of service.

and

The Nurse Clinician functions in any of the following roles: practitioner, role model, educator, consultant, collaborator, coordinator or change agent ... The major challenge of the nurse clinician is the need to shift the roles with the changing needs of the hospital and its programs, staff and patients. This requires a high degree of self direction, decision making, communication skills, and flexibility combined with the sense of oneself as a nursing leader although in a staff position.

Also in this respect, Glenna Nixon summarised her duties as follows:

The focus of my responsibilities prior to January 2nd were to assess the performance of nurses on the unit that I was working on. Where appropriate to provide for them guidance and instruction in their clinical skills; to provide in service education for them based on my assessment of the needs on the unit. To assist the patient care manager in doing performance appraisals based on my observation of their practice; and, acting as a role model at times giving direct patient care to difficult patients that were on the unit. Working with the multi-disciplinary team, involving them in patient care.

22. The fact that they evaluate employees and have input into disciplinary action might seem to place the nurse clinicians in a potential conflict of interest situation with the nurses in the bargaining unit. However, that may not be sufficient on its own to establish that they are management. The importance of that role in the entire range of responsibilities and duties of the nurse clinicians must also be considered, along with the other factors set out above. In that respect, much of the time of the nurse clinicians appear to be taken up with teaching and evaluation relating to that function; they may counsel employees with respect to further training or retraining which might be useful to them.

23. In the instant case, the nurse clinicians act in a professional, rather than managerial, role; that involves a certain amount of evaluation, as well as educative or training function. However, that does not make the position managerial. The nurse clinicians do not, in our view, exercise

the responsibility of hiring, firing, or disciplining or any other attribute of a direct management role; nor do they make "effective recommendations" with respect to hiring or firing or disciplining, although their comments appear to be treated seriously.

24. Accordingly, we find that the nurse clinicians at the Hospital do not exercise managerial functions within the meaning of paragraph 1(3)(b) of the *Labour Relations Act*.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. Board certificates in some instances describe bargaining units which include nurses "engaged in nursing care" whereas others use the phrase "employed in a nursing capacity". The certificate upon which bargaining rights are founded in the instant case is of the former variety.

2. "Nursing capacity" strikes me as a broad term which could encompass many changes in health care delivery and practice, some of which relate to patient care, while others may relate to training or other activities which may be regarded as being within the ambit of a "nurse's capacity".

3. "Nursing care", on the other hand, implies to me the actual giving of care to a patient in a hands-on manner, and as such, provides a much clearer line of demarcation.

4. The Nurse Clinician and Patient Care Manager classifications came into being as a result of the decision to segregate the administrative and clinical aspects of the Head Nurse classification. The Head Nurse, not being engaged in nursing care, was excluded from the bargaining unit.

5. It follows that in determining whether either the Nurse Clinician or Patient Care Manager should now be included in the bargaining unit the question the Board should ask itself in each case is: "Are the duties such that the incumbent can be said to be engaged in nursing care?" Since the Patient Care Manager, who is responsible for the administrative aspects of hands-on nursing care is excluded, I would have thought there is as much or more compelling reason for excluding Nurse Clinicians who oversee that care and instruct the care givers on special procedures.

6. In this result I would have excluded Nurse Clinicians on the grounds that they do not fall within the bargaining unit as defined.

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**2172-84-R** Carpenters' District Council of Toronto and Vicinity on behalf of Carpenters Local Union 27, United Brotherhood of Carpenters and Joiners of America, The Ironworkers District Council of Ontario, and International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, Applicants v. 270915 Ontario Limited, and 556347 Ontario Limited c.o.b. **Hardrock Forming Company**, Delform Construction Limited, Ilena Construction Limited, Respondents v. The Form Work Council of Ontario, and Labourers' International Union of North America, Local 183, Intervener

**Related Employer - Effect of related employer declaration would be to create jurisdictional dispute - Combined entity would become bound by conflicting collective agreements with two unions involving the same work - Board reluctant to make a "related employer" declaration when the effect is to create a conflict with established bargaining rights held by another union - Section 1(4) declaration not warranted**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *Sean O'Flynn*.

**APPEARANCES:** *M. A. Church*, *J. Cartwright* and *K. Ball* for Carpenters' District Council and Local 27; *David Starkman*, *Susan Ursel* and *Stan Arsenault* for Ironworkers' District Council and Local 721; *Jeffrey Davies* for Hardrock Forming Co.; *Richard J. Nixon* and *Carlo Delle Donne* for Delform Construction Limited; *Robert I. Goldin* and *John DiLorenzo* for Ilena Construction Limited; *B. Fishbein* and *R. Lotito* for Labourers' International Union of North America Local 183, and the Form Work Council of Ontario.

**DECISION OF THE BOARD;** June 30, 1987

# I

1. This is an application under section 1(4) of the *Labour Relations Act*. For ease of exposition, the parties will be referred to in abbreviated form as: "the Carpenters", "Hardrock", "Delform", "Ilena", "Local 183", and "the Ironworkers". The term "related" when used with reference to one or more of the respondents, means that they meet the statutory requirements for a section 1(4) "related employer" declaration.

2. The Board notes that partway through these proceedings, the Ironworkers withdrew their application and indicated that they had no further interest in the matter. The Board further notes that the Carpenters abandoned their alternative claim for relief under section 63 of the Act, and their challenge to the validity of the collective agreement between Delform and Local 183. Section 1(4) reads as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. It is not disputed that Hardrock is bound by the Carpenters' provincial agreement covering the ICI sector of the construction industry. Ilena and Delform are bound by a collective

agreement with the Formwork Council of Ontario ("the formwork agreement") which includes Local 183. The Carpenters argue that Hardrock, Ilena and Delform are all "related employers" within the meaning of section 1(4) and that the Board should declare them to be one employer for the purposes of the Act. The effect of such declaration would be to bind all three companies to the Carpenters' Provincial Agreement, and, at the same time, make Hardrock a party to the "formwork agreement" with Local 183. The respondents maintain that, whatever may have been the case in the past, Hardrock and Ilena are not now related nor is either of them related to Delform. In the alternative, the respondents argue that even if they are related, the Board should not so declare, because such declaration would create a conflict with Local 183's established bargaining rights and would immediately precipitate a jurisdictional dispute, because the parties would be bound by conflicting collective agreements.

## II

4. The hearings in this matter consumed many days as counsel traced the history of what came to be referred to colloquially, as the "John diLorenzo family of companies". In the Carpenters' submission, Mr. diLorenzo was either the principal or real economic force behind a network of corporate and commercial relationships which has been extended, most recently, to include Delform. Accordingly, we heard considerable evidence about Mr. diLorenzo's active companies, holding companies, payroll companies, personal shareholdings, family trust, and business activities over the years, as well as those of his partners and business associates from time to time. Indeed, in order to follow this evidence it was sometimes necessary to refer to diagrams or flow charts. However, we do not think that it is necessary to reproduce those details here. It will be sufficient to outline the corporate history, focussing specifically on the evolution of the parties' collective bargaining relationships.

5. Ilena was incorporated on July 15, 1971 and was immediately active in the residential concrete forming business, in and around Metropolitan Toronto. It was a time of booming residential construction - particularly apartment buildings. Ilena prospered, and was soon joined by a variety of sister companies: Felmar Forming Limited, Rail Forms Limited, (an equipment rental business), and Lerima Construction Limited, - all of which were controlled by John diLorenzo or his family through their holding company EMLI Holdings Limited.

6. Ilena signed its first collective agreement with Local 183 on September 24, 1971; and whether or not this first agreement was restricted to the residential sector (the language is somewhat ambiguous) subsequent agreements clearly were not. Nor did Ilena confine its activities to residential construction. As its business grew, it began to take on ICI jobs. That is what precipitated the first clash with the Carpenters and Ironworkers, and led to the incorporation of Hardrock.

7. In 1973 Ilena was engaged to do the form work on a commercial plaza in Rexdale. In accordance with its established practice, and its collective agreement, it used members of Local 183 to do the work. The Ironworkers and Carpenters protested that ICI form work was customarily done by their members, and "put heat" on DiLorenzo to recognize them. The exact nature of the "heat" was not specified in detail but apparently involved pressure on the general contractor to remove Ilena from the job, and replace it with a company with collective agreements with the Carpenters and Ironworkers. Ironworkers Local 721 also filed a jurisdictional dispute, requesting the Board to direct that some of the work in question be assigned to its members. In that regard, it is interesting to note that at paragraph 8 of the Board's decision in the jurisdictional dispute (reported at [1974] OLRB Rep. Nov. 775), the panel notes the existence of Hardrock and the possible application of section 1(4):

"Although the numbered company was not added as party, nor was any claim made that Ilena and the numbered company are one employer within the meaning of section 1(4) of the *Labour Relations Act*, the agreement does indicate that an agent of Ilena Construction, John diLorenzo, was prepared to recognize that the collective agreement with Labourers Local 183 had limitations in terms of performing commercial construction in the Toronto area. Indeed, Hardrock Forming, the name under which the Numbered Company subsequently operated has performed work on commercial projects".

8. Hardrock was incorporated on May 22, 1973 and entered into collective bargaining relationships with both the Ironworkers and Carpenters covering ICI form work. We were told that the Carpenters' collective agreement was concluded on October 11, 1973. The so-called "ICI agreement" has been replaced by a number of subsequent agreements: first through direct negotiations with an employer association, and, more recently, pursuant to the provincial bargaining scheme established in 1978.

9. That was the origin of Hardrock, but it is not the whole picture, nor entirely accurate today. Over the years, diLorenzo brought key employees into the Hardrock business, gave them an equity interest, and, to some extent, withdrew from direct involvement in the day-to-day affairs of the firm. We need not decide whether this withdrawal is sufficient to warrant a finding that Hardrock and Ilena are no longer related. Of more significance is the fact that the dichotomy between Hardrock and Ilena - the former doing ICI work and the latter doing residential work - was not maintained uniformly. There were a number of instances in which Ilena bid and performed ICI jobs using Local 183 members. When those jobs came to the Carpenters' attention, as they did on several occasions, the Carpenters' representatives took action on the site to have Ilena removed from the job and replaced by a firm in contractual relations with the Carpenters union. Usually the replacement was Hardrock. No claim was made under section 1(4) of the Act because, we were told, it was too time-consuming and expensive to launch proceedings before the Board - although section 1(4) claims were made with respect to certain other diLorenzo companies (CDC Forming Limited, Gold Structural Limited, and Bender Forming Limited). Of course, had such claim been made vis a vis Ilena, the Carpenters would have undoubtedly been met with the argument that no 1(4) declaration should be made because they had knowingly acquiesced in a situation which could lead to an erosion of their work opportunities in favour of Local 183 whose bargaining rights preceded their own.

10. The most recent actor on the scene is Carlo Delle Donne, whose company "Delform" was incorporated in December 1982 while he was still a key employee of Rilli Brother Forming ("Rilli"). Rilli is a competitor of both Hardrock and Ilena. Mr. Delle Donne had worked for Rilli for a number of years and was becoming increasingly dissatisfied because, despite his contributions to the business as a skilled estimator, he had no equity interest. His demands for participation in the Rilli business were repeatedly rebuffed. He left Rilli in February 1983, and after a short-lived joint venture with another individual, was hired by Ilena.

11. At the time, diLorenzo urgently needed someone of Mr. Delle Donne's caliber. DiLorenzo's own expertise lay in securing and financing the jobs. Ordinarily, he did not do the estimating, nor did he play much of a role in organizing the work flow or supervising the jobs. He usually left that to others; but in 1983 there were real problems. DiLorenzo welcomed the opportunity to hire Delle Donne, who, he knew, had, been a valued employee of Rilli for many years. DiLorenzo hoped that Delle Donne could "turn things around for Ilena". He did.

12. Delle Donne came to Ilena on the understanding that he would receive both a salary and a 15% equity interest in the business. The promised equity interest never materialized. Nor did a proposed partnership with Ilena to be known as Ilena-Delform. Delle Donne soon found

himself in the same position he had been in at Rilli: running important aspects of the business, but without any equity interest or direct participation in the profits he was helping to generate.

13. Delle Donne left Ilena after 16 months on the understanding that he would continue to monitor and help complete the projects in which Ilena was then engaged. In return, Ilena and Mary diLorenzo made certain pledges and short-term guarantees to the bank which assisted Mr. Delle Donne to get started in his own business. The guarantees were never called upon and have now long since lapsed. There is no evidence that diLorenzo plays any active role in the running of Delform; although Delform rents space in a "diLorenzo building" where Ilena has its offices, rents equipment (at market rates) from Rail, and has occasionally used, and paid for, the services of an office clerk who also works for Ilena. Mr. diLorenzo is not an officer, director or shareholder of Delform, nor is there any evidence that he or any of his companies participate in the profits generated by Delform.

14. In order to ensure access to a pool of experienced form workers, Delform entered into a collective agreement with Local 183 and with Local 793 of the International Union of Operating Engineers ("the Form Work Council of Ontario"). Because of his years in the forming industry, Delle Donne was familiar with both the unions and quite a number of the members who would be referred, from time to time, from the union hiring hall. Likewise, from past experience, Delle Donne knew a number of the foremen and site supervisors working in the industry. It is hardly surprising that some of the formworkers or their supervisors who had worked for Ilena, ended up working for Delform from time to time - especially since Ilena was winding down its operations.

15. Delform does not confine its activities to the residential sector of the construction industry. It bids on, or seeks to secure, both residential and ICI work. The evidence does not establish that diLorenzo provides any assistance in this regard. Quite the contrary. This application was filed when the Carpenters discovered Delform working on an ICI job at 40 Eglinton Avenue East. DiLorenzo was quite angry that Delle Donne had put in a bid through his own company, Delform.

16. The Carpenters urge the Board to find that Delform is "the new Ilena", which is now being used to actively undermine its bargaining rights with Hardrock. The Carpenters argue that, through Ilena, Delform is related to Hardrock, and that the Board should declare all three companies to be one employer for the purposes of the Act. The objective is to bind Delform to the ICI agreement which currently binds Hardrock. If that were accomplished, Delform would have to hire carpenters for its ICI formwork and pay them the provincial rates (we leave aside, for the moment, the obvious problem that Delform is already required to hire members of Local 183 to perform that kind of work, and is obliged to pay *them* the rates prescribed in the Local 183 collective agreement). Ilena is currently inactive.

17. The difficulty with the Carpenters' proposition is that if Delform really is "the new Ilena", the union is seeking a remedy against Delform which it would not get in respect of Ilena itself. The Carpenters have never represented the employees of Ilena. In 1973, they were content to enter into an arrangement with Hardrock which guaranteed them rights in respect of the work opportunities flowing *to that company*, but left their bargaining rights exposed in respect of work opportunities which could be channelled to Ilena which the Carpenters knew had a pre-existing relationship with Local 183. When those alleged "encroachments" did in fact occur, the Carpenters did not seek relief under section 1(4), but only sought to enforce their contractual "no subcontracting" arrangements with ICI general contractors. More fundamentally, however, a related employer declaration with either Delform or Ilena would immediately raise a conflict with Local 183's established bargaining rights and would immediately precipitate a jurisdictional dispute. In effect, the combined entity would become bound by conflicting collective agreements with two

unions involving the same work and Delform would be drawn into a jurisdictional dispute between them. That is a recipe for collective bargaining discord which we should not lightly condone; moreover, the Board has always been reluctant to make a "related employer" declaration when the effect is to create a conflict with established bargaining rights held by another union (See: *Al Smith Plastering and Partition Co. Ltd.* [1981] OLRB Rep. Feb. 129). Even assuming, without finding, that Hardrock and Ilena are related and that Delform is related to Ilena as well, (a doubtful proposition), we do not think that a section 1(4) declaration is warranted in the circumstances of this case.

18. The application is therefore dismissed.

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**2721-86-R Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources, and KBM Forestry Consultants Inc., Respondents**

**Bargaining Unit - Crown Transfer - Representation Vote - Board declaring KBM to be a successor employer and determining appropriate bargaining unit - Board declining to exercise its discretion to order a representation vote of the employees in the unit because no intermingling of employees and only one union involved**

**BEFORE:** *Patricia Hughes*, Vice-Chair, and Board Members *F. C. Burnet* and *L. C. Collins*.

**DECISION OF PATRICIA HUGHES, VICE-CHAIR, AND BOARD MEMBER L. C. COLLINS;**  
July 16, 1987

1. In a decision dated March 25, 1987 [reported at [1987] OLRB Rep. March 399], the Board, in a majority decision, found that there had been a transfer from the Crown to KBM of an undertaking (a project involving the harvesting and planting of trees) and that KBM is bound by the collective agreement entered into by the Crown and OPSEU, within the meaning of the *Successor Rights (Crown Transfers) Act* ("the Act").

2. The Board declared KBM to be a successor employer and to be bound by the collective agreement between the Crown and OPSEU. Paragraph 14 of the majority decision reads as follows:

14. Counsel for the respondent has requested that if we were to find that there had been a transfer of an undertaking from the Crown to KBM that we then determine the unit of employees that is appropriate for collective bargaining pursuant to section 4(1) of the *Successor Rights (Crown Transfers) Act*. This matter was not addressed by either of the other parties. Accordingly, we invite submissions on this particular issue and decline to comment further upon it until such submissions have been received and considered.

3. The recognition clause in the collective agreement recognizes OPSEU as "the exclusive bargaining agent for all public servants other than persons who are not employees within the meaning of clause f of subsection 1 of section 1 of the Crown Employees Collective Bargaining Act". Clearly, this description is not suitable with respect to the employees engaged in the undertaking transferred to KBM.

4. Counsel for KBM submitted that "the bargaining unit should be described in terms of all employees in KBM's consulting and contracting division, engaged in the harvesting and planting of trees". Counsel requested the Board to order a representation vote of the employees in the bargaining unit. Counsel for OPSEU submitted that the appropriate unit is "all employees of the respondent [KBM, presumably] at the Thunder Bay Nursery of the Ministry of Natural Resources, save and except supervisors and persons above the rank of supervisor". The Crown made no submissions on this issue.

5. Subsection 4(1) of the Act states as follows:

4.-(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause (a);
- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
  - (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
  - (ii) any bargaining unit defined in any collective agreement,
  - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
  - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

6. In this instance, the undertaking transferred is the harvesting of trees at the Thunder Bay Nursery of the Ministry of Natural Resources (the trees are to be later replanted elsewhere). The work is described in two contracts, referred in the March 25, 1987 decision as Contracts A and B (although those contracts describe the nature of the work encompassed by the project, our declaration is not, of course, limited to the terms of those contracts, as understood by the parties who had sought a decision prior to any contracts being entered into this year).

7. The Board finds that there should be a geographical restriction: on that issue, KBM proposes the municipality of Thunder Bay; OPSEU proposes a restriction to the Thunder Bay

Nursery. We believe the reference to the Nursery itself is appropriate in this case, rather than the entire municipality. We are satisfied that the appropriate description is:

all employees of KBM at the Thunder Bay Nursery of the Ministry of Natural Resources, save and except supervisors and persons above the rank of supervisor.

8. KBM requests a vote be held of employees in that unit. The Board may order a vote pursuant to section 8 of the Act and did so in *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445. In that case, two hospitals, one owned by the Crown and one private, merged to become one institution with resulting intermingling of employees. The Board determined that there should be eight bargaining units and ordered votes held with respect to each of those units in order to determine which union should represent the employees since the Ontario Nurses Association, the Canadian Union of Public Employees and OPSEU all had represented employees; furthermore, not all employees at the hospital were represented by a trade union. The Board did not order a vote in *The Corporation of the Regional Municipality of Sudbury*, [1981] OLRB Rep. March 251; there were two unions and intermingling of employees in that case, but the relative support enjoyed by each union was clear enough that the Board could determine which had a preponderance of support without a vote. In *The Corporation of the City of Timmins*, [1980] OLRB Rep. May 656, the Board found there had been a transfer within the meaning of the *Successor Rights (Crown Transfers) Act*. There was no intermingling. The successor employer had a collective agreement with CUPE which argued that the transferred employees (represented by OPSEU) properly belonged to its "outside bargaining unit". The Board held that "the purpose of the successor rights legislation is to preserve, rather than extend, extinguish or transfer bargaining rights" and the Board declared that OPSEU continued to represent the transferred employees.

9. In the instant case, there is only one union seeking to represent the employees. There is no intermingling of employees. The majority of the employees were hired specifically for the project; no current employees of the successor employer work alongside these employees, (it is not relevant in this regard if supervisors are persons who were KBM employees prior to the transfer); certain employees had worked for the Crown previously, but most had not. Therefore, counsel for KBM contends that the Board should order a representation vote. The fact that these employees are new to KBM is not relevant. In *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887 (a case under section 63 of the *Labour Relations Act*), the Board said the following with respect to the fact that a large number of new employees had been hired by the successor employer (and some employees previously working for the successor employer no longer worked for it):

28. ... Those circumstances would not normally give rise to a question of representation, unless it were a question raised in a timely manner by the employees themselves. The fact that some employees are new to the unit is of no more consequence than it would have been had the ownership of this business remained unchanged. The change of ownership does not change that result where, as here, the sale of business has not itself created circumstances which give rise to a question of representation.

Here there is no accretion to the bargaining unit already requested by OPSEU. There is no intermingling of these employees with employees who have been represented by another union or with previously unorganized employees.

10. The Ministry hired individuals each year to do the harvesting; these worked, as counsel for KBM describes the KBM employees, "on a casual or intermittent basis". While these particular persons hired by KBM had not been represented by OPSEU before, neither would many of

the persons hired year to year by the Ministry. But employees performing harvesting work had been represented by OPSEU. OPSEU's right to represent employees doing harvesting work continues, regardless of which individuals are doing the work. New employees, never before hired by the Crown, would be members of the bargaining unit represented by OPSEU once they were hired to do the harvesting in the spring or fall. Similarly, new employees, never before hired by either the Crown or KBM, are members of the bargaining unit represented by OPSEU, once hired to do the harvesting. Accordingly, we decline to exercise the discretion granted us by section 8 to order a representation vote of the employees in the bargaining unit.

#### **DECISION OF BOARD MEMBER F. C. BURNET;**

1. Having disagreed with my colleagues on the primary issue as to whether a sale of a business had occurred, and since my decision, had it prevailed, would have rendered academic the secondary issues of description of a bargaining unit and the need for a vote, I deal with those secondary issues without prejudice to my position on the earlier primary issue.

2. Board policy is stated to be:

Where a transfer between sectors occurs, there can be no presumption that the existing bargaining units will continue in their same form. In the Board's view, the presumption is the opposite, that existing bargaining units must be adapted to fit the bargaining structure of the sectors that they have just entered. To take the other approach would be to create an anomalous and unwieldy bargaining structure that would defy all common sense. (*Owen Sound General and Marine Hospital* decision, [1978] OLRB Rep. May 445).

3. It is apparent that the definitions in the *Crown Employees Collective Bargaining Act* and the *Public Service Act* of "Employee", "Public Servant", "Crown Employee", and "Person employed in a confidential capacity" does not fit the Board's established bargaining structure for the private sector and must be adapted.

4. Having regard to the evidence and submissions, I would conclude that the bargaining unit should be described in terms of all employees in KBM's consulting and contracting division, engaged in the harvesting and planting of trees, with the usual supervisory exclusions.

5. I would also conclude, in accordance with the Board's established policy that the bargaining unit should encompass the municipality of Thunder Bay. Inasmuch as not more than 47 (and a minimum of 18) out of approximately 260 employees had previously been employed at the Nursery by the Crown and represented by the applicant union, I would have ordered a vote.

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**0445-87-U Jean Liebman, Complainant v. York University Staff Association and York University, Respondents**

**Duty of Fair Representation - Unfair Labour Practice - Earlier section 68 complaint resulting in Board directing that grievance be reinstated and rescheduled for arbitration - Board indicating in earlier decision that union had a right to settle the grievance prior to arbitration - Executive Board of union accepting a settlement that was unacceptable to the complainant - No breach of fair representation duty**

**BEFORE:** *R. O. MacDowell*, Alternate Chair.

**APPEARANCES:** *James Fyshe* and *Jean Liebman* for the applicant; *James Hayes*, *Celia Harte* and *John Carter* for the York University Staff Association; *Don J. Mitchell* and *S. Young* for York University.

**DECISION OF THE BOARD;** July 31, 1987

I

1. This is the complaint of Jean Liebman who contends that she has been dealt with by the York University Staff Association ("the Union") contrary to section 68 of the *Labour Relations Act*. Section 68 reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Ms. Liebman contends that the union acted improperly, and in breach of its section 68 obligation, when it decided to settle her grievance against York University, rather than proceed with it to arbitration. Ms. Liebman maintains that this decision was "arbitrary", and undertaken without sufficient consultation with her or her solicitor. She further complains that the union has failed to pay certain legal costs which, she says, it was obliged to do.

2. A hearing in this matter was held, in Toronto, on June 23, 1987. All parties were represented and extended the opportunity to lead evidence and make their submissions. The complainant and the union both took that opportunity. The University did not call evidence, but made representations as to the result which the Board should reach on the basis of the evidence before it.

3. Credibility, as such, is not really an issue in this case. I do not doubt that ms. Liebman was accurately recounting the situation as she saw it. Nevertheless, I am bound to observe that I prefer the evidence of the complainant's regular counsel, Mr. Charles Campbell, and the evidence of the union's regular counsel, Ms. Susan Ballantyne, whenever their version of events contradicts that of the complainant. (I say "regular counsel" because, at material times, communication between the parties was conducted by counsel who later testified before me - waiving questions of privilege - but who necessarily were unable to represent Ms. Liebman in these particular proceedings). The complainant was frequently confused and demonstrably reluctant to accept any factual assertion inconsistent with her own view of reality or "justice". For example, she initially testified that she was surprised by, and had almost no notice of, an important union meeting on February 24, 1987, when, in fact, she had at least ten days' notice. She denied ever receiving a letter from the union concerning the proposed settlement of which she now complains, when, in fact, she must have received it (and her counsel certainly did). She testified that, throughout her long dispute

with York, and later with her union, she has tried to maintain a "low profile", has never intentionally fueled the controversy, or drawn attention to herself and only raised that issue when other employees approached her. However, it is quite clear, that she voiced her complaints to almost anyone who would listen and, directly, or through her counsel, initiated contact with the local press which resulted in a certain amount of media coverage. There was nothing wrong with that, of course, because Ms. Liebman felt deeply aggrieved by the way in which she had been treated, and I do not think much turns upon the fact that she made her grievances known to fellow employees or the media. It is simply that her recollection of the facts is shaped by her own particular perspective and may not, for that reason, be entirely accurate.

4. In order to appreciate the context in which the present proceeding arises, it is necessary to sketch in the factual background. Some of these matters have already been canvassed in an earlier Board decision involving these same parties (hereinafter sometimes referred to as the "Gray" decision). Other issues were amplified or clarified in the proceedings before me. However, it is important to stress at the outset, that this case involves Ms. Liebman's complaint of improper treatment *by her trade union*. The fairness or otherwise of her treatment by York University, is not directly in issue.

## II

5. Jean Liebman is a secretary. She was first employed by the University in 1968. She subsequently worked in the sociology department for approximately 17 years. She was happy there. She had a degree of security, and a certain sense of "place", because she had her own office and was not working in the general office area with her fellow secretaries of similar rank. She had been there a long time, and, in her view, had done a good job. There is nothing in the evidence before me to suggest otherwise.

6. This happy situation changed in or around 1983, when the University installed a new department head, and introduced changes in the way that work was organized and distributed among the secretarial staff. Ms. Liebman was shifted into the general office area and her former office was re-allocated to faculty members who had previously had to share office space.

7. Ms. Liebman resisted these changes to her relationship with management, faculty members, and other employees. She regarded them as unfair and a form of harassment. As a result, there was growing friction and discord within the department.

8. As the earlier Board decision records, Ms. Liebman was pressing and persistent in voicing her complaints to staff, faculty members, members of the University's administration, and ultimately to her trade union. Before me, her regular counsel frequently lapsed into military metaphor, referring to "the campaign", "the battle", and, ultimately, to his efforts to achieve a "peace treaty". To the extent that her complaints involved the working relationship with other bargaining unit employees, she was told by the union that these disputes could not be dealt with in the grievance procedure which governs the relationship between the employer and its employees. No one suggests otherwise.

9. Eventually, the union requested a union-management meeting, in the hope that this might resolve the deteriorating situation in the sociology department. The result of that meeting was an agreement that York would retain the services of an independent consultant to review the problems in the department and make recommendations. That was done.

10. The consultant interviewed quite a number of faculty members and support staff about "the problem". Their comments are recorded in the consultant's report and if that report accu-

rately reflects what was said (leaving aside, for now, what was true), the views were quite mixed. There were a number of conflicting opinions about the real source of the difficulties and the most appropriate solution.

11. Whatever its truth or validity, the consultant's report was not very complimentary to any of the disputants, or factions in the sociology department. It was critical of Ms. Liebman, her immediate supervisor, other members of management and what was described as a "fractious" faculty group with too much time on their hands. The consultant concluded that some members of faculty had used Ms. Liebman's resistance to change as a vehicle for their own resistance. In some cases, there was a rather cynical attempt to keep Ms. Liebman as, in effect, their own private secretary to the exclusion of other legitimate claims upon her time. The situation had descended into pettiness and backbiting, and, in the consultant's opinion, indicated a strong lack of "cohesiveness" and direction within the department.

12. The consultant recommended that the solution to the problem was the lateral transfer of Ms. Liebman to an equivalent position elsewhere in the Faculty of Arts, and the lateral transfer of her immediate supervisor to a similar level position elsewhere in the University. The consultant recommended that those transfers be implemented "quickly and concurrently". They were. On November 8, 1984, Ms. Liebman was transferred from the sociology department to a position in the same salary grade in the secretarial pool in the Faculty of Arts. She suffered no loss of income or other benefits as a result of this transfer. However, she considered it to be a "slander on her name", and filed a grievance alleging a breach of the collective agreement. She also retained counsel and launched a civil action for slander against the University and the Dean of the Arts Faculty.

13. Ms. Liebman's grievance was processed through the various discussion stages of the grievance procedure and, with some reluctance, the union decided to proceed with it to the arbitration stage. The union was not at all sanguine that an arbitrator would find Ms. Liebman's lateral transfer to be a breach of the collective agreement, or that s/he would direct that Ms. Liebman be returned to her former job in the sociology department. The arbitration of Ms. Liebman's claim was not without its risks, and of course, her quest for vindication would necessarily involve protracted and expensive litigation. That is why the union eventually accepted what it considered to be a reasonable offer from York to settle the entire matter.

14. The union's dealings with Ms. Liebman prior to June 6, 1985, were described by the earlier Board panel as follows:

Nothing in the evidence before me suggests that YUSA acted in an arbitrary, discriminatory or bad faith manner in its representation of the complainant prior to June 6, 1985. Nothing in the evidence suggests that either the union's appraisal of the potential risks and benefits of arbitrating her grievance or its conclusion that York's last offer was an appropriate settlement of the grievance was unreasonable.

The Board added:

...Having heard Ms. Liebman testify, I can understand the union's concern that she might reject an objectively reasonable offer if she thought she could still have her day in court.

I can also understand that concern. It is entirely borne out by the evidence before me.

15. The arbitration of Ms. Liebman's grievance was scheduled to begin on June 7, 1985. On June 5, 1985, York made two settlement offers. The first was that Ms. Liebman could resign and would be paid the equivalent of six months' salary. That offer was rejected. The second offer was

described by the union's then solicitor in a letter dated June 6, 1985 (although there is now some doubt about whether it accurately portrayed York's position):

The second offer was that Mrs. Liebman will be given three months' paid leave of absence after which upon her return she will be offered two positions by York University from which to choose. In addition, her legal costs up to \$1,500.00 will be paid. On top of that an apology will be provided to her and her file purged to her satisfaction. In exchange, the University requests that she provide an undertaking whereby she will no longer carry on in her battle with the University or her fellow employees.

The union was anxious to have Ms. Liebman's answer. The majority of the members of the YUSA executive felt that this offer was a reasonable one and that the union should withdraw the arbitration if Ms. Liebman rejected it. As I have already noted, although framed in the double negative, ("not unreasonable"), the earlier panel did not quarrel with the union's assessment of the merits of the grievance, or the union's judgement that the proposed settlement was appropriate.

16. On the evening of June 5th, Ms. Liebman met with Charles Campbell, her personal solicitor. Mr. Campbell had been retained in April of 1985, and has been advising her ever since. They discussed the offer. Ms. Liebman was not prepared to accept it right away. She had reservations. She did not think that the offer went far enough or was sufficiently detailed.

17. The following morning Ms. Liebman contacted her local MPP and sought to arrange a meeting with the President of York University to seek further assurances. He indicated that he would try to arrange such a meeting. Ms. Liebman called Campbell just before 10 o'clock in the morning to say that she agreed with the proposed settlement "in principle", subject to satisfactory negotiation of the form of the University's apology, and the form of her personal undertaking not to "pursue the battle" with York and her fellow employees.

18. It is debatable whether that agreement *in principle* would ever have been translated into a settlement *in fact*. Certainly it seems unlikely that this could have been done before June 7th. Mr. Campbell testified before me that he anticipated "tough bargaining" about the form of the apology, because the complainant's position was that a return to the sociology department was the only real "exoneration", and failing that, she wanted to go to arbitration. Since the University later denied that it had undertaken to apologize at all, it seems very doubtful that it would have agreed to an apology sufficiently abject and sweeping to satisfy Ms. Liebman. My impression is that, if pressed, it is more likely than not that Ms. Liebman would have rejected the 1985 settlement proposal as she later rejected the proposal made in 1987.

19. The union concluded that Ms. Liebman's contact with her MPP, and the University President represented an *implicit* rejection of the settlement offer which the union considered to be reasonable. Accordingly, the union withdrew the grievance. It did so without actually confirming that rejection with Ms. Liebman or her solicitor. That is what troubled the earlier panel of the Board, which observed:

It was not an express or implied condition of the offer that Ms. Liebman have no communication with anyone at York before accepting it or rejecting it, yet YUSA withdrew the grievance from arbitration because it had learned from York that she had tried to make an appointment to see York's President. On the basis of that fact, it assumed, incorrectly, that Liebman had decided to reject the offer. It acted on that assumption without first speaking to Liebman or Campbell, as it could easily have done within the time constraints it faced....Having defined as critical the question whether or not its grievor would decide one way or the other with respect to a settlement offer, the union acted arbitrarily and breached section 68 by making an assumption on the point without asking the grievor either directly or through counsel, what decision she had made.

The Board directed that the grievance be reinstated and rescheduled for arbitration, but it was careful to point out that:

While this decision requires that the arbitration of Ms. Liebman's grievance be reinstated and rescheduled for hearing before a sole arbitrator, it does not require that the arbitration hearing inevitably take place. It need not, if the grievance can be settled in the meantime. The union has the right to settle grievances without the consent of grievors, subject only to the requirements of section 68. The remedy in this case will not include a direction that the grievance not be settled without the complainant's consent, but only that the union not agree to a settlement without first advising the complainant of the proposed terms and affording her or her representative an opportunity to discuss them with those who will make the union's decision whether to agree to the settlement. *It is important for Ms. Liebman to understand that if the union can obtain a settlement of her grievance which gives her as good a remedy as an arbitrator might reasonably be expected to award with respect to the alleged improper job transfer, she will not then be in a position to insist that the grievance proceed to a hearing.*

[emphasis added]

The Board rejected Ms. Liebman's demand for costs and the unilateral right to select counsel for the arbitration hearing if her case were not settled. The Board directed, *inter alia* that:

- (a) the respondent and intervener shall reinstate the arbitration of the complainant's transfer grievance and reschedule it for hearing by a sole arbitrator agreed upon by the respondent, complainant and intervener. If those parties are unable to agree on a sole arbitrator, the respondent and intervener shall jointly request of the Minister of Labour that he appoint one.

• • •

- (c) The respondent union shall retain counsel jointly selected by it and the complainant to act in its name at and in connection with the arbitration of the grievance.
- (d) The respondent union shall not agree with the intervener employer to a settlement of the complainant's grievance without first advising the complainant of the proposed terms of settlement and affording her or her representative an opportunity to discuss them with those who will make the union's decision whether to agree to the proposed settlement.

20. Item (c) of the Board's remedial order later turned out to be a matter of some controversy. Ms. Liebman insisted on being represented by Mr. Campbell who had advised her throughout, and continued to represent her in her civil action against the University. She would not agree to anyone else. The union was prepared to agree to any lawyer in the City of Toronto who regularly acted on behalf of trade unions in contested collective bargaining matters. In a letter dated September 18, 1986, the union's new counsel, Ms. Susan Ballantyne, listed eight law firms whose partners or associates would be acceptable. The list includes virtually all of the members of Toronto's "labour bar" other than those in Ms. Ballantyne's own firm; however, out of an abundance of caution she added: "YUSA would be happy to agree to any other union labour lawyer who might have been inadvertently omitted from this list. The union's only criteria is that the lawyer must specialize in labour relations". Ms. Ballantyne is herself an experienced labour lawyer who has practised for some years in this field. Her firm was retained by the union after the OLRB hearing but before the Board issued its first decision.

21. What was the union's concern? According to Ms. Ballantyne, it was two-fold. Mr. Campbell, whatever his qualifications as a litigator, was not experienced in the law or practice of labour arbitration; moreover, the Liebman grievance would be the first time that an arbitrator would be called upon to interpret the transfer provisions of the collective agreement. Any interpre-

tation rendered by that arbitrator in what is admittedly an unusual case, could have ramifications for the entire bargaining unit.

22. The union's other concern was monetary. It wanted some indication of the total cost of the proceeding - bearing in mind that Ms. Liebman's crusade for personal vindication would necessarily be financed by her fellow employees in the bargaining unit. The union wanted some assurances that the legal costs incurred prior to the Board's decision, or the costs that were associated with her civil action against the University, would not creep into the final bill.

23. In the end Ms. Liebman got her way. By summarily rejecting all of the lawyers proposed by the union, YUSA was left with the option of either accepting Mr. Campbell or litigating the issue before the Board with whatever legal costs that entailed (and, of course, once again, such costs would ultimately be borne by the other employees in the bargaining unit). Mr. Campbell was eventually accepted. To address the fee issue, the parties executed the following agreement:

The Union agrees to retain Mr. Charles Campbell to represent Ms. Liebman at the arbitration of her transfer grievance. This agreement is on the condition that Mr. Campbell's fees will not exceed \$2,500.00 for the first day of the arbitration, and \$1,000.00 per day of hearing thereafter.

24. Mr. Campbell explained that he ordinarily bills his time at a stipulated hourly rate, but learned that it was the custom of labour law practitioners to "build in" a block amount for the first arbitration day to compensate for their preparation. He and his client were content with that formula. That is why the agreement stipulates that he will be paid \$2,500.00 for the first day of hearing and \$1,000.00 for every day thereafter.

25. The parties anticipated a long hearing. Eventually, ten days were set aside by the arbitrator, and it is not clear whether even that would have been enough. What is clear, is that the legal and arbitration costs associated with this one case, involving a lateral transfer in which Ms. Liebman had suffered no direct financial loss, would likely exhaust the union's entire annual legal budget. To arbitrate this one case, in the way that Ms. Liebman wished, would likely entail expenditures in the order of \$20-30,000.00 - or perhaps more. Moreover, as it turned out, Ms. Liebman hoped to use the arbitration process to complain not only about her transfer *in 1984*, but also about certain consequences associated with a subsequent layoff *in 1986*. That matter deserves brief mention.

26. In February 1986, Ms. Liebman was given notice of layoff from her position in the secretarial services group of the Faculty of Arts because, in her employer's opinion, she had not "proved suitable for retraining" on the new equipment which York wished to introduce. She was to be maintained at her current salary for about a month, and, thereafter, would have the right under the collective agreement to exercise her seniority rights to move to another position within the University, (displacing a less senior person), provided that she was qualified to perform the duties of the selected job.

27. There is no evidence before me that Ms. Liebman ever sought to exercise her seniority rights to "bump" into another position. She accepted the layoff and filed a grievance. That grievance was resolved to her apparent satisfaction (and with the advice of her counsel) in a settlement identified before me as exhibit 5:

**RE: LAYOFF GRIEVANCE OF JEAN LIEBMAN**

1. The parties agree that the Grievor will receive sick pay for the period April 23 - July 23, 1986, and that the appropriate deductions will be made from her sick leave bank.

It is understood that the Unemployment Insurance Commission will be reimbursed for any monies paid to her during this period.

2. The parties agree that the Grievor will return to her position in secretarial services on November 10, 1986, or such later date as may be required to allow for completion of training.
3. The parties agree that for the purpose of her entitlement to seniority, vacation, sick leave credits, pension and benefits, the Grievor will be treated by the Employer as if she had been working for the period April 23 to "the date of recommencement of employment".
4. The parties further agree that if, on January 31, 1987, the Grievor has proven herself to be satisfactorily retrained on the word processing equipment in use in her position, she will be fully compensated for all wages lost during the period July 24 - November 9, 1986, on the following basis:
  - a) 50% of the total amount to be paid by the Employer;
  - b) 50% of the total amount to be paid by the Union.
5. The parties agree that in the event the Grievor is assessed to be "unsuitable for retraining" (within the meaning of Article 16.07), she is still entitled to the rights guaranteed her by Article 16.07 of the 86/87 Collective Agreement. The parties also agree that she is entitled to grieve any assessment of her job performance or retraining that is inaccurate, unjust or otherwise in violation of the Collective Agreement.
6. The Union and the Grievor agree to withdraw the grievance.

DATED this 6th day of November, 1986.

28. As a result of that settlement, during a period of nine months when the complainant was absent from work, she received her full salary. It was agreed that because, during part of this period, she was experiencing physical and emotional difficulties, she would be treated as being "on sick leave", and that, accordingly, an appropriate number of days would be deducted from her "bank" of sick leave credits. It is not disputed that, at this stage, her actual "loss" in this regard remains indefinite, and perhaps hypothetical. It will only crystalize if, over the next few years, she contracts illnesses which require absences beyond the total number of days remaining in her sick leave bank. For the remainder of her layoff period Ms. Liebman was fully reimbursed for all income lost, with the union paying half of the agreed amount. The settlement preserved Ms. Liebman's right to challenge York's initial assessment that she was unsuitable for retraining, as well as her right to grieve such assessment. In the result, Ms. Liebman was away from work for nine months, but was paid her full salary for that period.

29. Ms. Liebman expressed no dissatisfaction with that resolution at the time, and, as I have already mentioned, she signed the settlement document after taking legal advice. Later though, she complained that her total accumulated bank of sick days had been reduced by the number of days when she was indisposed but on layoff. It is not disputed that under the terms of the collective agreement then prevailing, a laid-off employee would not have been entitled to claim any sick pay at all.

30. Ms. Liebman does not suggest that there was anything improper in the way that the union represented her in 1986, nor does she resile, *directly*, from the settlement of her 1986 grievance. She does suggest now, that her illness in 1986, following her layoff, is causally connected to her job transfer in 1984, and that, therefore, despite the settlement of her layoff grievance, she should be entitled to claim compensation for that alleged "loss" in 1986, in any arbitration con-

cerning the 1984 transfer. At the time that her layoff grievance was settled pursuant to the terms of exhibit 5, she did not share that theory with either her union or the employer. As far as they were concerned the layoff grievance was settled. Ms. Liebman's current complaint surfaced only later, as one of a number of reasons why she was not prepared to accept a settlement of her 1984 transfer grievance.

31. The arbitration hearing proceeded, as scheduled, on February 6, 1987. Ms. Liebman was not represented by Mr. Campbell. She was represented by James Fyshe, her counsel in the former and present proceedings before this Board, but not the lawyer whom the parties had agreed would represent her.

32. The union was annoyed about that - not least because of Ms. Liebman's earlier insistence that only Mr Campbell could represent her, the union's eventual agreement to retain him, and the negotiations concerning the payment of his fees. After Ms. Liebman's insistence that absolutely no one except Mr. Campbell could represent her, the union was a little surprised when Mr. Fyshe unexpectedly appeared on the scene. In addition, during the hearing, Mr. Fyshe apparently made certain allegations that the union was being unco-operative. The union considered those allegations to be totally unwarranted, and protested to Mr. Campbell.

33. Mr. Campbell explained that he had been called away unexpectedly to a jury trial and he apologized for not advising the union, in advance, that he would not be appearing. With respect to the other assertions he commented:

With respect to the documentation requested upon which Mr. Fyshe commented during the arbitration that seems to me a simple misunderstanding for which appropriate apologies were tendered.

34. On or about February 11, 1987, Ms. Ballantyne was advised that York was considering another settlement proposal. The terms of the proposal were not then known, however, it was canvassed at a meeting attended by Don Mitchell, Sheila Young and Susan Bisset (counsel) on behalf of the University, and Celia Harte and Ms. Ballantyne on behalf of the union. Mr. Campbell was not in attendance. Ms. Ballantyne explained that the settlement proposal was rather unexpected and she wanted to determine how serious it was, and to get some sense of the employer's "bottom line" before pursuing the matter further with Ms. Liebman or her counsel. Neither Ms. Ballantyne nor the union had any intention of agreeing to anything without first consulting with the complainant and her solicitor.

35. Ms. Bisset indicated that if the complainant was still unhappy with her present job, the University was prepared to offer her the first available vacant position, at the grade 4 secretarial level, anywhere in the Faculty of Arts, *except* the sociology department. The University was not prepared to return her to the sociology department because her old position no longer existed and, more importantly, it did not want a recurrence of its past problems. When pressed by Ms. Ballantyne, the employer modified its position somewhat, indicating that it would give the complainant a right of first refusal with respect to the first *two* vacancies in her job category anywhere in the Faculty of Arts, and further, that it would waive any reliance on the 30-day trial period specified in the collective agreement. This concession was made because the union expressed concern that any alleged performance problems arising during the first 30 days could effectively diminish the real value of the employer's current offer. For its part, the union agreed to waive the job posting provisions in the agreement because, if it did not do so, Ms. Liebman would have to compete with other equally or better qualified members of the bargaining unit for any available openings. By waiving the job posting requirements, Ms. Liebman was assured of an unfettered choice of the next two job openings which might arise. Finally, York undertook to purge Ms. Liebman's personnel file of

any adverse comments or documents which the University might otherwise be entitled to rely upon in its future dealings with her. She would have a completely clean employment record.

36. There was some dispute about whether in June 1985, the University had ever offered to provide Ms. Liebman with a formal written apology, and whether if such possibility was discussed it would or should have been part of a final settlement with her. But, of course, there was no settlement in 1985, and by 1987, that debate had become academic. Ms. Bisset made it clear that the University was not prepared to offer an apology now.

37. By letter dated February 12, 1987, Ms. Ballantyne advised both the complainant and her solicitor of the proposed settlement terms:

Dear Ms. Liebman:

Re: Your Transfer Grievance

The University has indicated to YUSA that it is interested in settling your transfer grievance, and has made an offer which YUSA has decided to recommend to you.

I understand that you would like your former position of research secretary (Secretary 4) in the sociology department back. Unfortunately, the University tells me that following your transfer from the sociology department, there was a reorganization of the secretarial staff there, and your former position no longer exists. (It is indisputable that no one has had that position since you were transferred from it in November, 1984.) In these circumstances, the arbitrator hearing your transfer grievance is most unlikely to order that you be reinstated to your former position (assuming your grievance succeeds). In the absence of language in the collective agreement to the contrary, it is well within an employer's rights to reorganize its work force - even if this means the loss of one or more positions. Arbitrators are exceedingly loathe to interfere with that exercise of "management rights". In our opinion, the *most* you can expect from an arbitrator is an order requiring the employer to place you in a position equivalent to the one you were transferred from.

The University has offered to do this. They are prepared to give you *your choice* between the two first available Grade 4 secretarial positions that come open within any academic department of the Faculty of Arts except sociology.

We are advised that in 1986 there were approximately 8 such vacancies in the Faculty of Arts. This will give you an idea of the frequency of vacancies.

If, within 30 working days, you find you do not like the new position, you have an unconditional right to transfer back to your present Grade 4 position in Secretarial Services. The University is waiving its right to use the same 30 day period as a trial period - in other words, if you decide that you like the new job, it's yours. If you accept such a transfer, YUSA would waive job posting requirements pertaining to the transfer.

The University has also agreed to remove from your file any disciplinary material relating to your transfer. This would include all documents containing adverse comments on your work performance.

I am not sure whether you recall a reference to an apology that was allegedly offered during the original attempts to settle your grievance. I inquired about this, to see if this part of the "offer" was still available. Ms. Bisset, counsel for the employer, advises me that no such offer was ever made. The reference to an apology in a letter to Mr. Campbell from Mr. Harrison (then counsel for YUSA) was apparently the result of a misunderstanding. The University is *not* prepared (and say they never have been) to offer an apology.

In our view, this offer is a very good one, and we strongly recommend that you accept it. The offer gives you substantially all that you could hope to achieve through arbitration, and does so now instead of several months from now. You must be aware that there is always a risk that you

will not succeed, no matter how strong you believe your case to be. I understand that you are seeking punitive damages and damages for mental distress. I'm sure your counsel will have advised you of the unlikelihood of such an award. There is no arbitral authority for such damages, and in my opinion, it is most unlikely that the law will be changed in your arbitration case.

The University's offer is without prejudice to their position, and the settlement (if one is reached) would be without prejudice to your position, the University's or YUSA's. It is also not intended to set a precedent for any future proceeding, nor is it an admission of liability on any side. (Your counsel will tell you that these are normal stipulations in any settlement.)

Should a settlement be reached, the University and YUSA are both prepared to declare that they regret the length of time and inconvenience involved in bringing your grievance to a conclusion.

If you decide to accept this offer, you would, of course, have to agree to have your grievance withdrawn and settlement terms would be incorporated in a written Memorandum of Settlement between the parties. If you do decide to accept, could you please let me know as soon as possible.

If you decide to reject it, I must have written notice of this by 4:00 p.m. on Friday, February 20, 1987. If you reject the offer, the executive of YUSA would like to hear from you and/or your counsel your reasons for so doing.

The executive will then consider these reasons, and will decide what course to follow. The next meeting of the executive following February 20 is Tuesday, February 24, at 5:30 p.m. You and your counsel are welcome to attend, should this step be necessary.

Please call me (or have your counsel call me) if you have any questions.

38. In the complainant's view, this proposed settlement of her 1984 transfer grievance was totally unacceptable. It did not include an offer of a *further* three months off, with pay, which had been part of the University's settlement proposal in 1985 - although to keep matters in perspective, it must be remembered that Ms. Liebman had already been away from work, and paid, for approximately nine months between February and November 1986. The settlement proposal would not reimburse her for her legal fees. It did not address the depletion of her accumulated bank of sick days in 1986 (i.e., the matter purportedly settled by exhibit 5). If she got sick in the future, she would have fewer days to draw upon. And the proposed settlement did not contain an apology.

39. Ms. Liebman testified that, in her view, the only redress that she wanted was a transfer back to her old job in the sociology department. The only acceptable alternative way of "clearing her name" that she could conceive of, was a full arbitration of the merits of her transfer grievance. This question was put to her in several ways and the answer was always the same. Having regard to the evidence before me, it is difficult to resist the conclusion that nothing short of protracted litigation or a transfer to her old job would satisfy Ms. Liebman.

40. Ms. Liebman's solicitor was also unhappy about the settlement proposal, but from a somewhat different perspective. Mr. Campbell conceded, in evidence, that if the matter were arbitrated, Ms. Liebman was unlikely to recover her legal costs. He was not aware of any arbitration decision awarding such costs, and in her successful proceeding before the Board this same request had been rejected. Nor was Mr. Campbell aware of any arbitration award in which a grievor had received damages for "mental distress" either in circumstances similar to those of Ms. Liebman, or at all. Some recent court decisions suggest that in a wrongful dismissal action, (which this is not), compensation under this head may be recoverable, however, even in that context, recovery is problematic and the context here is quite different. Mr. Campbell was also unaware of any arbitration award in which an employer had been directed to tender an apology, but, he said, that really did not matter. The real objective was to secure Ms. Liebman's reinstatement to the sociology depart-

ment and, from that perspective, an apology was secondary. Indeed, in a letter to Ms. Ballantyne dated February 23, 1987, he suggested that "an apology at this stage will make little difference".

41. There is no indication that the University has ever been prepared to put Ms. Liebman back in the sociology department, nor was that part of the 1985 settlement proposal which Ms. Liebman says she accepted "in principle."

42. Mr. Campbell hoped to use the prospect of protracted litigation with its attendant expense and potential for adverse publicity, to wring further concessions from the University - and, in particular, either Ms. Liebman's reinstatement to the sociology department or an apology that would totally vindicate her. However, he did not share that "game plan" with the union. Nor did he indicate his intention to argue that the grievor's illness in 1986 was connected to her lateral transfer two years earlier, so that the arbitrator of that grievance, (despite the settlement mentioned above) could restore her lost sick leave credits. Indeed, Mr. Campbell testified that he did not share with the union any of the results of his investigation or preparation for the arbitration case or the position(s) he proposed to take. He had carriage of the proceeding, the union's relationship with his client was obviously a difficult one, and he felt himself to be under no particular obligation to reveal to the union his intended course of action. Although formally retained and paid by the union, pursuant to the Board's order, he was acting for Ms. Liebman. That is why the union considered it appropriate to have its own representative at the arbitration hearing. It had no guarantee that Mr. Campbell's (entirely proper) zeal to advance his client's interest, would not result in positions or suggested interpretations of the collective agreement which might be inconsistent with the intentions of the bargaining parties or adversely affect other employee members of the bargaining unit in other situations.

43. The University's latest settlement offer sparked a spirited exchange of views between Ms. Ballantyne and Mr. Campbell. Both solicitors debated, with some vigour and vituperation, the merits of the settlement proposal. They disagreed, fundamentally. Ms. Ballantyne thought that the proposal was probably the best that could be obtained in the circumstances, while Mr. Campbell maintained that it was not as good as the earlier settlement offer and, therefore, should be rejected.

44. The union's ultimate decision was influenced, in large measure, by Ms. Ballantyne's legal advice, her judgement about the merits of Ms. Liebman's grievance and the prospects of an arbitrator making a favourable award. These matters were canvassed, once again, at a YUSA executive board meeting held on February 24, 1987. Although specifically invited to attend, neither Ms. Liebman nor her counsel chose to do so. Mr. Campbell testified that he had already made all of the representations he considered necessary either in his letters to Ms. Ballantyne or his conversations with her. Ms. Liebman testified that she had nothing to add. The tenor of the debate is accurately reflected in the minutes of the executive board meeting which read as follows:

#### 1. LIEBMAN TRANSFER GRIEVANCE

Harte informed the Executive Board that the University had offered a settlement of the Liebman transfer grievance at a meeting of the Union and the University and their respective legal counsels on February 11, 1987. The Executive Board was asked to read the recent correspondence between Ballantyne and C. Campbell, legal counsel for Jean Liebman, regarding the offer. (Copies of the correspondence were provided for Executive Board members and copies are attached to the minutes.) Harte explained that the Executive Board's task was to decide whether to accept or reject the offer. Ballantyne was invited to attend the meeting to answer questions on the case and clarify the rights and responsibilities of the Executive in making such a decision.

After the Executive Board had finished reading the correspondence, Ballantyne briefly

reviewed the set of events which resulted in Liebman filing a Section 68 complaint with the Ontario Labour Relations Board. In reviewing the decision on the Section 68 complaint, Ballantyne noted that the Board had found that YUSA had violated the Labour Relations Act. By both withdrawing the grievance and not accepting the settlement offer, the Union had left the grievor with no recourse. As a remedy, the Board ordered that the grievance be revived and ordered the parties to proceed to arbitration. The Board also ordered YUSA and Liebman to jointly select legal counsel to represent the Union at the arbitration. The Board stated that if the Union and the University wanted to settle the arbitration, it could not do so without first giving Liebman the opportunity to discuss it with the Executive Board.

It was noted that Liebman and her counsel had been invited to discuss the matter with the Executive at this meeting, but there was no response to that invitation.

Ballantyne next addressed the question at hand - should the offer by the University be accepted? The letters which Ballantyne has received to date from Liebman's legal counsel imply that Liebman is rejecting the offer, although Campbell does not state this directly in the letters. Ballantyne advised the Executive Board that it does have the right to settle the grievance without Liebman's consent. She pointed out that YUSA is the bargaining agent for Liebman and that grievance-arbitration procedures are between the legal parties, i.e. the Union and the University.

In making the decision, Ballantyne cautioned the Executive Board to consider what the grievor could be awarded from a favourable arbitration decision, not what she would like to be awarded. She pointed out that Liebman lost no compensation by being transferred to Secretarial Services. The best possible arbitration award would put her in a position equivalent to the one she held before the transfer. Ballantyne noted that the position from which Liebman was transferred no longer exists in Sociology (Arts). In the absence of evidence that the position was eliminated as a means to get rid of Liebman, Ballantyne stated that an arbitrator would not order the reinstatement of the position. In a favourable decision, an arbitrator would likely order that she be placed in the next vacancy equivalent to the job from which she was transferred. Ballantyne pointed out that through negotiating with the University, the Union has improved upon this. The University has agreed that Liebman will be given the choice of the first two grade 4 secretarial positions that come open within any academic department in the Faculty of Arts except Sociology. Ballantyne noted that excepting the Department of Sociology from the offer is not unreasonable. She also advised the Board that a settlement does not have to include everything that might be won in a favourable arbitration award. Ballantyne also pointed out that the University has agreed to remove from Liebman's Personal File any disciplinary material relating to the transfer, including any documents containing negative comments about work performance.

Ballantyne compared the time it will take to receive an arbitration award with the time it will take to implement the present offer. With respect to the latter, Liebman will be offered the next vacancy. If the arbitration proceeds, however, there will be at least seven or eight days of hearings and the time it will take the arbitrator to consider the case and write his decision. Ballantyne stated that, at best, YUSA could expect to win what the University is offering now, three to four months later. She also pointed out that the Union may not be successful in the arbitration.

Ballantyne next addressed the items which Campbell suggests Liebman would like to see in an offer:

**DAMAGES:** Liebman would like to be awarded damages for mental distress. Ballantyne stated that no arbitrator has ever given damages for mental distress and the arbitrator is not likely to do so in this case.

**AN APOLOGY:** Ballantyne stated that Campbell implies in his letters that Liebman would like an apology from the University. Campbell claims that the University offered an apology in the 1984 offer. Ballantyne and Harte noted that they do not know with certainty whether an apology was part of the previous offer; however, the University does not have to offer it now. Ballantyne pointed out that there is no basis in the case law for obtaining an apology. Arbitrators consider this to be outside their jurisdiction. In her opinion, it would be appropriate for arbitrators to order apologies

in many cases and arbitrators may do so in the future, but it is highly unlikely that this will occur in this case.

**SICK LEAVE:** Campbell objects to the current offer because it includes no reference to sick leave. Ballantyne pointed out that Liebman was fully paid for her sick leave under the terms of the layoff settlement. Liebman was fully aware of the terms of that settlement. Fyshe and Campbell were her legal advisors at that time.

**PAID VACATION:** Campbell contends that the University offered a lengthy paid vacation to Liebman in its earlier offer. Ballantyne stated that it is a misnomer to call it a paid vacation. She advised the Executive Board that an arbitrator could not order a paid vacation for Liebman because she has not been off work and did not lose compensation. There is no wrong to rectify.

**LEGAL FEES:** Ballantyne noted that the University previously offered to pay \$1,500 towards Liebman's legal expenses. The University is not prepared to make such an offer now. Ballantyne reminded Executive Board members that the legal fees for this arbitration will be paid for by YUSA, providing Campbell acts as legal counsel. She advised Executive Board members that an arbitrator would not order that legal fees be paid that were incurred for a different proceeding.

In summing up, Ballantyne advised the Executive Board to judge the University's offer by comparing it with what Liebman could reasonably hope to get in an arbitration award.

At this point, Harte invited questions from the Executive Board. Kirby asked whether Liebman could appeal the Executive's decision, if the Executive decided to accept the offer. Ballantyne replied that Liebman could not appeal the decision, although she could file a Section 68 complaint with the Labour Relations Board; however, it is unlikely that she would be successful. One Executive Board member asked whether Ballantyne's letter constituted a sufficient explanation and advisement of the offer. Ballantyne replied that they did and reiterated that Liebman had been told twice in the letters of the date and time of the Executive's meeting. The Section 68 decision orders YUSA to afford Liebman the opportunity to discuss the proposed terms of the settlement. YUSA has clearly done this.

Ballantyne noted that the arbitration will cost YUSA approximately \$1,500 per day (even without its legal counsel present). An Executive Board member asked whether costs were a legitimate consideration. Ballantyne pointed out that the Executive Board has a responsibility to the YUSA membership to spend financial resources wisely, and therefore, the cost of the arbitration is a legitimate consideration.

As there were no further questions, Harte asked the Executive Board if there were any objections if Ballantyne stayed to hear the Board's decision. There were no objections.

In discussion, Streb noted that the University's offer to remove derogatory comments from Liebman's record goes a long way towards an apology. It was also noted by the Executive, that should a settlement be reached, the Union and the University are both prepared to declare that they regret the length of time and inconvenience involved in bringing the grievance to a close.

The discussion touched upon and accurately explored the weaknesses of the complainant's case.

45. As is evident, Ms. Ballantyne was rather pessimistic about the prospects of securing, from an arbitrator, the results which Ms. Liebman demanded. In fact, even Mr. Campbell was pessimistic about that - hoping, instead, to use the threat of a costly, protracted and potentially embarrassing arbitration hearing to obtain those concessions from the University through a process of negotiations. On the other hand, the University's new settlement proposal did offer the complainant some benefits or advantages to which she would not otherwise be entitled and which an arbitrator was unlikely to award.

46. The executive board considered the options. Eventually, it was determined that the case

should be settled along the lines suggested by the University. The union decided that this settlement was a reasonable one. Formal minutes of settlement were executed on March 5, 1987.

47. In making its decision, the executive board was well aware that the settlement was unlikely to be acceptable to Ms. Liebman. Only a week before (and despite express language to the contrary at paragraph 17 of the Gray decision), Ms. Liebman's counsel had asserted the *unilateral* right to control the arbitration proceedings and to accept or reject any settlement offer. The executive board anticipated (correctly as it turned out) a new section 68 complaint, and, in an effort to avoid that possibility passed the following motion:

In view of the fact that Owen Gray of the Ontario Labour Relations Board remains seized of the section 68 complaint, it is moved that we should offer to join Mrs. Liebman in putting the matter back before the Board.

The union was not seeking to shirk its responsibilities. It was content to have its decision scrutinized by the Board Vice-Chair who had found against it in the first instance. Ms. Liebman was not content with that proposal. She filed a new complaint.

### III

48. The question before me is really a relatively narrow one: has the union acted in a manner that is: *arbitrary*, *discriminatory*, or in *bad faith*? In answering that question, it may be useful to refer (as did Vice-Chair Owen Gray) to the decision of the Board in *Catherine Syme*, [1983] OLRB Rep. May 775. There, too, the Board was faced with a complaint that an employee's grievance had been improperly settled. The Board made these observations:

20. Section 68 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any partic-

ular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinantly adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence on one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

49. In the instant case, there is no serious allegation and, in my view, no reliable evidence to suggest that the union acted in a manner that is either "discriminatory" or "in bad faith". On the contrary, the evidence indicates that in this, as in the previous problems which the complainant has had with her employer, the union did what it reasonably could to support her position. Nor, in all the circumstances, do I think that the union's decision can be characterized as "arbitrary". The union officials were not unsympathetic to the complainant's position, but ultimately decided that it was without substantial merit and did not justify proceeding to arbitration. In reaching that decision and, indeed, in all of its dealings with the complainant following the Gray decision, the union was acting on the advice of its counsel, Ms. Ballantyne. And apart from its error in failing to actually verify Ms. Liebman's acceptance or rejection of the June 1985 settlement offer, the Gray panel found no fault in the union's previous dealings with her.

50. In 1987, the union settled Ms. Liebman's grievance because, it was advised by its counsel that an arbitrator was not likely to grant the relief she requested. That legal advice is most probably right, is an eminently reasonable reading of the facts and the current state of the arbitral jurisprudence, and I do not think that it can be said that the union acted in an "arbitrary way" when it was relying upon its solicitor's advice.

51. This is not to say that a lawyer's opinion will always provide a complete defence to a section 68 allegation, or that retaining counsel will provide a shield in every conceivable circumstance. Hiring a lawyer may not erase or successfully redress a previous breach of the duty of fair representation, and there may well be extraordinary cases in which the sins of a solicitor will be visited upon his/her union client under section 68 of the Act, leaving the union with whatever remedies may be available to it in the civil courts. But this is not one of them. Ms. Ballantyne's advice was no less reasonable or professional than that of Mr. Campbell, and while the two lawyers differed about questions of law and tactics, I do not think that when YUSA followed its own lawyer's quite sensible advice, it was acting "arbitrarily" and in breach of the *Labour Relations Act*.

52. Counsel for the complainant asks, parenthetically: How can the Board condone a settlement which is inferior to the one offered in 1985, when the Board has already found that the acceptance of the earlier offer was improper? The answer to that question is to be found in a careful reading of the earlier Board decision and an appreciation of what it did, and did not decide.

53. The Board did not definitively determine whether the 1985 settlement offer was objectively reasonable, but a fair reading of the Board's decision, in its totality, suggests that it was; and that is certainly the view that I take of it. The Board did not decide whether, *on that basis*, the offer should or should not have been accepted or whether the union's decision in this regard would be "arbitrary". The Board did not question the union's right to settle grievances, including Ms.

Liebman's on a reasonable basis, whether or not she was satisfied with the result. The Board decided only that, if the union itself made her opinion an important element in the decision-making process, the union should find out what her opinion was. The decision focussed quite narrowly on the procedure that the union adopted rather than the substantive merits of its position, and does not really explore the significant probability that if Ms. Liebman had been pressed for a definitive answer, as she should have been, it would have been "no" or its practical equivalent. Finally the Gray decision did *not* direct the arbitration of Ms. Liebman's grievance, nor prohibit the union from entering into a reasonable settlement. On the contrary; paragraph 17 of the decision contemplates precisely that possibility. What we have here, then, is a situation in which Ms. Liebman has been presented with, but for various reasons has not taken up, two objectively reasonable proposed settlements of her 1984 transfer grievance; and to the extent that she now complains that the 1987 proposal is inferior to the 1985 offer, it must be remembered that, at the time, she did not immediately and unequivocally embrace the 1985 offer either. Had she done so, the grievance would have been settled on that basis and two proceedings before the Labour Relations Board would have been avoided.

54. What about Ms. Liebman's claim that the union should have paid more towards her legal expenses? In my view, that issue is answered quite definitively in the agreement that she signed, wherein the union undertook to retain Mr. Campbell and pay him the sum of \$2,500.00 for the first day of hearing, which sum included a component for preparation time. I do not doubt (and it is not disputed) that he may have spent more time preparing for a case which, potentially at least, could consume many hearing days. But the fact remains that the fees agreement is very clear: Mr. Campbell is to be retained and the union will underwrite his fees to the total of \$2,500.00 for the first day of hearing and \$1,000.00 for each succeeding hearing day. There is no undertaking to pay Mr. Fyshe or anyone else, and no obvious obligation to pay more than \$2,500.00 in a case which, in the result, only lasted one day. No one doubts the propriety or fairness of Mr. Campbell's bill; but, with respect to Ms. Liebman, the union was not acting in a manner that was arbitrary, discriminatory, or in bad faith, when it declined to pay more than the amount previously agreed to.

55. For the foregoing reasons, this complaint is dismissed.

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**2516-86-U; 2693-86-U; 2995-86-M Ontario Nurses' Association, Complainant v. Oakridge Villa Nursing Home, Respondent; Extendicare Health Services Inc., Complainant v. Ontario Nurses' Association, Respondent; Oakridge Villa Nursing Home (Extendicare Health Services Inc.), Employer v. Ontario Nurses' Association, Trade Union**

**Change in Working Conditions - Collective Agreement - Conciliation - Duty to Bargain in Good Faith - Reference - Unfair Labour Practice - Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer - Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector - Employer unable to rely on ostensible authority of negotiating committee - Document null and void as a collective agreement - Employer breaching duty to bargain in good faith by signing agreement - Breach of freeze by implementing**

**employment terms not agreed to by union - Minister having authority to appoint a conciliation officer**

**BEFORE:** *Rosalie S. Abella*, Chair, and Board Members *D. A. MacDonald* and *B. Armstrong*.

**APPEARANCES:** *Loretta Mikus*, *Mary Hodder*, *Cathy Green*, *Edith Klassen*, *Jean Jordan* on behalf of Ontario Nurses' Association; *Paul Jarvis*, and *Judith Clarkson* on behalf of Oakridge Villa Nursing Home (Extendicare Health Services Inc.).

**DECISION OF THE BOARD;** July 30, 1987

1. The central issue in these consolidated proceedings is whether or not a collective agreement has been entered into between the Ontario Nurses' Association (O.N.A.) and Oakridge Villa Nursing Home/Extendicare Health Services Inc. Several issues are before us, all of which depend on our determination of whether the agreement exists as a binding legal document. There is a complaint by O.N.A. that Oakridge has violated sections 15 and 79 of the *Labour Relations Act* and section 13 of the *Hospital Labour Disputes Arbitration Act*. Oakridge/Extendicare has complained that O.N.A. has violated sections 15 and 70 of the *Labour Relations Act* by refusing to recognize the collective agreement as valid. In addition, there is a referral by the Minister pursuant to section 107 of the *Labour Relations Act* questioning his authority to appoint a conciliation officer in this case.

2. O.N.A. has had two previous collective agreements with Oakridge. Bargaining for those two agreements, as for all of O.N.A.'s agreements, proceeded through a process whereby O.N.A.'s elected Joint Bargaining Objective - Setting Committee devised a questionnaire for all 45,000 members, tabulated the results, and ultimately formalized a document setting objectives for the next round of bargaining.

3. O.N.A. represents 105 nursing homes and homes for the aged. Of these, 22 are owned by Extendicare. Oakridge, one of Extendicare's homes, was organized in 1982. One of O.N.A.'s traditional bargaining objectives has been parity for nurses in nursing homes with wages received by nurses in hospitals. Except for the period when wage restraints were imposed, O.N.A. has consistently refused to enter into a collective agreement if parity could not be achieved, preferring to allow the matter to go to arbitration. O.N.A. continues to refuse voluntarily to agree to bargaining terms which do not meet this central objective for nursing homes.

4. O.N.A.'s locals are not, in some significant respects, autonomous. O.N.A., rather than the local, is the party to any agreement. It has always been O.N.A.'s practice that collective agreements entered into bear the signature of a centrally employed Employment Relations Officer. It was O.N.A.'s evidence that no collective agreement has ever been executed without either the signature of the Employment Relations Officer or of O.N.A.'s Chief Executive Officer, who has the constitutional right, with O.N.A.'s Board of Directors, to resolve any disputes between the local and the central office.

5. In July 1986, Cathy Green, O.N.A.'s Employment Relations Officer with responsibility for Oakridge, served notice to bargain. The first meeting took place on December 3, 1986. She, Pat Gallinger, Pat Sinclair, and Barb Meloche constituted O.N.A.'s negotiating committee. Other than Green, the negotiating committee consisted of bargaining unit members. Sam Mandelbaum, Extendicare's Manager for Labour Relations and Diane Cole, the Administrator for Oakridge attended for the employer. Green identified herself as the spokesperson for the negotiating committee and indicated that if anything were to be signed, she would have to sign on O.N.A.'s behalf.

Proposals were exchanged, starting with Green's presentation on O.N.A.'s behalf. Agreement was reached during the morning on several issues, but negotiations broke down on the question of parity. Green explained that, in accordance with the O.N.A. bargaining objectives, she was unable to settle for less than parity. The negotiations adjourned at lunch to give Green an opportunity to discuss the parity issue with her negotiating committee, all of whom were anxious to accept the employer's wage proposals rather than await the outcome of arbitration. In the two previous rounds of bargaining at Oakridge, the refusal to grant parity had resulted in arbitration, a process which had in each case resulted in long-delayed awards and no parity.

6. At lunch with her committee members, Green explained to them that she had no mandate to accept anything less than parity. In the face of their obvious frustration and concern, she suggested the committee meet that afternoon with Mary Hodder, then the Manager of Employment Relations for O.N.A. Green informed Mandelbaum of her intentions and told him that she would let him know if she got O.N.A.'s authority to accept his offer. He gave her his card and told her to contact him with her position.

7. At the meeting later that afternoon with Hodder, Hodder showed the committee the Joint Bargaining Objectives Guidelines and explained that accepting an agreement for less than parity would have harmful effects on O.N.A.'s bargaining positions with other employers. Oakridge's offer was 2% below parity. She explained that in the absence of approval from O.N.A.'s Board, she herself could not authorize a settlement that violated the parity objectives. The next available board meeting was not to be until February 4, 1987.

8. On December 4, Green called Gallinger to tell her that they could accept an interim agreement to bring the nurses up to the 1986 wage rates provided it was without prejudice to negotiations for the final wage package. When Green called Meloche and Sinclair the same day to advise them of this possibility, she was told by them to hold off on requesting an interim arrangement because they had called a membership meeting for that evening. Green asked if she could attend and was told she could not. Green understood at this point that her committee members were "upset" at not being permitted to sign an agreement.

9. On December 5th, Judith Clarkson, Director of Labour Relations for Extendicare's Eastern Canadian Region, attended negotiations with Meloche, Gallinger and Sinclair at Cole's request. Mandelbaum could not attend because of a death in his family. Cole told Clarkson the negotiating committee wanted to meet with her to accept Mandelbaum's proposals. Clarkson met first with Cole and Marilyn Karn, Regional Director at Extendicare, to review the proposals. She then met with the negotiating committee and asked if Green would be attending. She was told by them that they had tried unsuccessfully to reach Green, but that they were the bargaining unit negotiating committee and had the right to do the bargaining. Clarkson offered to adjourn the negotiations until Green and Mandelbaum could attend the following week, but was told by the nurses they wanted to conclude the agreement that day. The agreement was in fact signed that day, notwithstanding Clarkson's former bargaining experience with O.N.A. which ought to have alerted her, at the very least, to being wary in accepting the bargaining unit member's assertions of authority to bargain.

10. There was a meeting of the membership of the O.N.A. local purporting to ratify the agreement reached earlier in the day by Meloche, Gallinger and Sinclair in Green's absence. On December 8th, after talking to Clark, Mandelbaum drafted a collective agreement based on the December 5th memorandum of settlement. Mandelbaum admitted that he had never personally experienced a situation in which a collective agreement was finalized with O.N.A. without the signature of an Employment Relations Officer. He also admitted that he knew of no occasion when

O.N.A. agreed to settle at less than parity. There was "no doubt" in his mind what Hodder's position on parity was throughout 5 years of an "excellent relationship" with her. Although Mandelbaum learned on December 8th about Green's December 5th letter, he did nothing about it.

11. On December 5th, Green spoke to Meloche who advised her that she had signed a memorandum of settlement with the employer on behalf of the negotiating committee. Green, in turn, advised Meloche that it was not a valid collective agreement without Green's signature. After talking to Meloche, Green immediately sent a letter by courier to Judith Clarkson, Director of Labour Relations at Extendicare. It read:

"Dear Ms. Clarkson:

Failure to bargain with the Association is contrary to the Labour Relations Act. If you continue to meet with the local to bargain without the Association, who is the bargaining agent, we will file charges at the Labour Board. We also draw to your attention that any settlement not agreed to or signed by the representative of the Association itself is invalid.

Cease and desist negotiations without Association representative immediately."

12. Clarkson stated that she got Green's letter of December 5th at 4:15 p.m. the same day, but proceeded to sign anyway because the letter had "no meaning" for her since she felt she had a valid memorandum of settlement bearing the signatures of the negotiating committee. Clarkson also admitted, however, that despite several years of experience, she has never had negotiations without an O.N.A. Employment Relations Officer being present, or seen an agreement signed by O.N.A. without an Employment Relations Officer's signature. She was also aware of O.N.A.'s position on parity. She stated that she accepted the bargaining unit nurses' version that they had the authority to bargain.

13. A purported collective agreement was signed on December 19th by Gallinger, Meloche and Sinclair on behalf of the union and Clarkson, Cole, and Karn on behalf of the employer. Green next heard from the employer by registered mail in a letter dated December 22, 1986. That letter states:

"Dear Ms. Green:

Please find enclosed one signed original copy of the collective agreement between Extendicare/Oakridge Nursing Home and the Ontario Nurses' Association covering the period from January 1, 1986 to December 31, 1987 for your records. I have also forwarded three signed original copies to the members of the O.N.A. Negotiations Committee at Oakridge plus the Letter of Intent concerning Job Sharing and Cash Settlement, copies of which are also enclosed.

Sincerely,

Sam Mandelbaum."

14. It is clear both from O.N.A.'s constitution and its historic practices that collective bargaining takes place through O.N.A.'s central office. No agreement has ever been signed without an Employment Relations Officer or without the approval of O.N.A.'s Board of Directors. This practice was known to Mandelbaum and Clarkson, as was O.N.A.'s refusal willingly to sign an agreement which failed to achieve wage parity with the hospital sector. The local bargaining committee members were firmly told, first by Green and then by Hodder that they had no mandate to enter into an agreement unless parity was obtained. This local committee consisting of Meloche, Sinclair and Gallinger had no authority to sign any agreement, regardless of its terms, without the concurring signature of Green. Given the company's experience with, and knowledge of O.N.A.'s

negotiating practices, particularly in light of Green's letter, it cannot rely on the ostensible authority of the bargaining unit members of O.N.A.'s negotiating committee. In the absence of O.N.A.'s signature through its Employment Relations Officer, O.N.A. was not a party to the agreement and therefore, absent Green's signature, no collective agreement exists between these parties. What has been signed is a document executed by Extendicare, which had legal authority to sign, and the local negotiating committee which, according to O.N.A.'s constitution, did not. The document is therefore null and void as a collective agreement and not binding on O.N.A.

15. What remains to be decided are the cross-applications pursuant to section 15 of the *Labour Relations Act* alleging bad faith bargaining, and O.N.A.'s complaint pursuant to section 13 of the *Hospital Labour Disputes Arbitration Act*. Extendicare is accused of bad faith in signing the document notwithstanding the warning it received via Green's personally communicated caveats and her letter received by Oakridge on December 5th. O.N.A. is accused of violating the duty to bargain in good faith for its refusal to acknowledge the agreement. In our view, O.N.A.'s complaint must succeed. Extendicare was not only imprudent in signing the settlement and collective agreement, faced with Green's letter of December 5th and based on the personal experience Mandelbaum and Clarkson had in the past with O.N.A., they ought moreover to have known that they were circumventing the union in signing with the bargaining unit members. The union was, in this case, O.N.A., and Extendicare knew that O.N.A. was unwilling to sign. The bargaining unit members in these circumstances had neither the ostensible nor actual authority to bargain or sign without O.N.A. On the other hand, O.N.A. cannot be held to have violated section 15 of the Act for refusing to acknowledge as legal and binding a collective agreement it rightly perceived to be void and contrary to its own constitution.

16. As to the freeze violations, clearly there is a technical breach in Extendicare's implementation of terms and conditions the union had not agreed to, given our finding that there is no valid collective agreement.

17. In all the circumstances of this case, therefore, we find that there is no collective agreement between the parties and the Minister therefore has the authority to appoint a conciliation officer. The panel will remain seized in the event that the parties are unable to agree to an appropriate remedy for the remaining violations.

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### **0853-87-R Ontario Secondary School Teachers' Federation, Applicant v. The Peel Board of Education, Respondent**

**Certification - Pre-Hearing Vote - Applicant requesting pre-hearing vote but also requesting that the appropriate unit be determined before any vote conducted - Board not having jurisdiction to conduct mid-hearing representation votes - Applicant abandoning its request for a pre-vote hearing - Voting arrangements detailed**

**BEFORE:** Owen V. Gray, Vice-Chair, and Board Members J. A. Rundle and H. Peacock.

**DECISION OF THE BOARD;** July 22, 1987

1. By decision dated July 15, 1987, we directed "that this matter be listed for hearing on Monday, July 27, 1987, to afford the applicant the opportunity to show cause why its request that a

pre-hearing vote be conducted should not be denied and to entertain the parties' submissions with respect to the means by which notice should be given to affected employees if the application proceeds otherwise than as contemplated by the language of section 9 of the Act." The reason for this direction was that the *applicant* had requested that the appropriate bargaining unit be determined *before* any vote is conducted. A vote conducted after a hearing with respect to one of the matters referred to in subsection 9(4) of the *Labour Relations Act* ("the Act") would not be a pre-hearing representation vote within the meaning of section 9 of the Act. While it might be useful if the Board could conduct mid-hearing representation votes (that is, votes taken after some but not all of the substantive issues in the application had been heard and determined) and be able to act on their results after the hearings are complete, the Act does not appear to give the Board that jurisdiction.

2. By letter dated July 20, 1987, the applicant has abandoned its request for a pre-vote hearing and determination of the parties' substantive dispute over the configuration of the appropriate bargaining unit.

3. In our decision of July 15, 1987, we made it clear that we would have directed a pre-hearing representation vote as requested by the applicant if it had not made an inconsistent request for a pre-vote hearing. As the applicant is no longer making that inconsistent request, we revoke our direction that this matter be listed for hearing and, for reasons given in our earlier decision, we direct that a pre-hearing representation vote be conducted in the following voting constituency:

all occasional teachers of the respondent in its secondary panel in the  
Regional Municipality of Peel.

The phrase "occasional teacher" has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, R.S.O. 1980, c.129, as amended. All employees of the respondent in the voting constituency on July 8, 1987, who are employees in the voting constituency on the date of the vote will be eligible to vote. (With respect to the question of who may be an "employee in the voting constituency" in the context of an application involving occasional teachers, see *Board of Education for the City of York*, [1985] OLRB Rep. May 767; *The Board of Education for the City of Scarborough* [1987] OLRB Rep. Jan. 119; and *The Board of Education for the City of Hamilton*, [1987] OLRB Rep. June 847.) Voters will be asked whether they wish to be represented by the applicant in their employment relations with the respondent.

4. In accordance with the Board's current practice, the vote will be conducted by poll, but notice to employees of the taking of the vote will be given both by postings in the respondent's schools and by mail to the persons named on the voters' lists prepared by the parties. The respondent shall provide the Board with two sets of mailing labels (one for the notice of taking of vote and one for the subsequent notice of Returning Officer's report) containing the names and last addresses known to the respondent of all of the persons on the voters' lists. The applicant may also (but is not required to) supply two sets of mailing labels with respect to any or all of the persons on the voters' list. If the addresses on the applicant's and respondent's labels for any person differ, notices will be sent to both addresses. The parties have agreed to a vote date in late September or early October 1987. Mailing labels for the purpose of notice to employees are to be supplied by August 14, 1987. Notices are to be mailed to employees no earlier than the first week of September 1987.

5. The ballot box will be sealed and the ballots not counted pending determination of the parties' dispute over the composition of the appropriate bargaining unit.

6. The matter is referred to the Registrar.

**2795-84-U United Steelworkers of America, Complainant v. Shaw-Almex Industries Limited, Respondent v. Group of Employees, Objectors**

**Damages - Practice and Procedure - Unfair Labour Practice - Respondent's business records voluminous - Inappropriate for Board to direct respondent to move the documents away from its premises to allow the complainant to inspect them for purpose of assessment of damages - Amount of wages and benefits paid to employees working as strike replacements considered relevant to the assessment of damages**

**BEFORE:** *Harry Freedman*, Vice-Chair, and Board Members *R. J. Gallivan* and *J. Kennedy*.

**APPEARANCES:** *Brian Shell* and *Joe Miles* for the complainant; *Michael Gordon*, *Randolph King-horne* and *Jonathan Shaw* for the respondent; no one appearing for the objectors.

**DECISION OF THE BOARD;** June 25, 1987

1. The Board made the following oral ruling at its hearing in this matter on June 22, 1987:

The Board has received detailed argument concerning the production of records and the disclosure of information for purposes of the complainant's cross-examination of Jonathan Shaw and the parties' preparation of their respective cases for the assessment of damages. After exchanges between counsel both outside and within the hearing room, counsel for the complainant and counsel for the respondent have agreed to the exchange of certain information and the production of certain documents. However, the parties disagree with respect to two items:

- (i) whether the amount of wages and benefits paid between December 12, 1984 and January 9, 1987 to employees working as strike replacements is relevant to the assessment of damages, and
- (ii) whether the respondent must provide the complainant with access to the relevant documents for purposes of inspection away from the respondent's premises.

With respect to the second issue, we find that inasmuch as the relevant documents are part of the respondent's normal business records and, according to counsel, are quite voluminous, it is inappropriate to direct the respondent to move the documents away from its premises to allow the complainant to inspect them. We, of course, recognize that there is still a strike ongoing at the respondent's premises. In our opinion, the review of the respondent's business records for purposes of preparation of the complainant's cross-examination and preparation of its case for the assessment of damages is not the kind of activity that affects the integrity of the complainant or its legal strike against the respondent. In other words, the attendance by counsel for the complainant at the respondent's premises is not for the purposes of performing struck work or for any other purpose that would assist the respondent in continuing to resist the consequences of the legal strike. Therefore, when one views the purpose of the attendance at the respondent's premises against the significant amount of effort and disruption that would arise if we

were to agree to the complainant's request to have production off of the respondent's premises, we decline to make any order and simply note that the respondent undertakes to make available for inspection at its premises the business records as requested by counsel for the complainant in his letter of June 18, 1987.

We also note that counsel for the complainant will provide a list of "related subjects" before the production of documents takes place.

With respect to the first issue, a majority of the Board, Board Member Gallivan dissenting, finds that the amount of wages and benefits paid to the employees working as strike replacements from December 12, 1984 to January 9, 1987 is relevant to the assessment of damages. Counsel for the respondent contended that the offer that the complainant did not accept provides the amount that the striking employees would have been paid during that time. We disagree. That financial offer was withdrawn on or about December 31, 1984 and it is by no means clear what the offer to the complainant would have been if it had included a non-discriminatory return to work protocol. In our view, the measure of damage is as best assessed by looking at what the respondent paid to have the work of the bargaining unit done during the period of time in question.

Mr. Gallivan disagrees. In his opinion, without knowing whether the jobs of the employees working as strike replacements were comparable to the jobs performed by the striking employees, the Board cannot say with any certainty what the appropriate starting point for the measure of damages is.

2. Having regard to the agreement of the parties, in addition to the dates scheduled for hearing, being August 19, 20 and 25, the Board hereby fixes August 17, November 2, 3, and December 16, and 17 for continuation of the hearing before this panel of the Board.

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**3207-86-R** Labourers' International Union of North America, Local 506, Applicant v. **Sinclair Welding Ltd.**, Respondent v. International Union of Operating Engineers, Local 793, Intervener #1 v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, Intervener #2

**Bargaining Unit - Certification - Construction Industry - Labourers' Union requesting an "all employee" unit for persons engaged in the erection and finishing of precast concrete products in the ICI sector - Respondent and intervenors requesting that unit be described in terms of "all construction labourers" - Employee bargaining agency designation order referring to "all employees" - Board concluding that the question of the description of a bargaining unit and the wording of the designation are not co-extensive - Board must be sensitive to jurisdictional disputes - Board generally avoiding an all employee unit in the construction industry - Competing jurisdictional claims by intervenors involved in this application - Unit confined to construction labourers**

**BEFORE:** *R. A. Furness*, Vice-Chair, and Board Members *H. Kobryn* and *D. A. MacDonald*.

**APPEARANCES:** *David Strang, Ed Ferreira and Archie St. Cyr* for the applicant; *K. W. Kort and F. Wiles* for the respondent; *E. A. Ford* for intervener #1; *Timothy Hadwen* for intervener #2.

**DECISION OF R. A. FURNESS, VICE-CHAIR; July 9, 1987**

1. The name of the respondent is amended to read: "Sinclair Welding Ltd."
2. I find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 21, 1978, the designated employee bargaining agency is The Labourers International Union of North America and The Labourers International Union of North America Ontario Provincial District Council.
3. I further find that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

4. The applicant has applied for certification with respect to a bargaining unit described as follows:

All employees of the Respondent engaged in the erection and finishing of precast concrete products in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Ontario Labour Relations Board Area 8, save and except non-working foremen and persons above that rank.

5. In its reply the respondent claimed that the appropriate bargaining unit ought to be described as:

All construction labourers in the employ of the Respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

It was the position of the respondent that it is a party to two provincial collective agreements in the industrial, commercial and institutional sector of the construction industry with each of the interveners and that each collective agreement has a term from May 1, 1986, until April 30, 1988.

6. Intervener #1 claimed to be the bargaining agent of employees who may be affected by the application. Intervener #1 relied upon a collective agreement between itself and the respondent covering certain employees of the respondent in Ontario. Intervener #2 also claimed to be the bargaining agent of employees who may be affected by the application. Intervener #2 relied

upon a voluntary recognition and acknowledgement document signed by the respondent and intervenor #2 dated August 10, 1978, and a collective agreement between Ontario Erectors Association and Iron Workers District Council dated September 18, 1986.

7. The parties agreed that on the date of the filing of this application the respondent was undertaking two projects in the industrial, commercial and institutional sector of the construction industry. The parties also agreed that at least one of the employees working at the project in the City of North York was a member of the applicant and believed he was going to a union job which had not yet been organized by the applicant. The parties further agreed that intervenor #1 did not dispatch any of its members to do precast work on the project in North York. There was also agreement that the respondent was working as a subcontractor to Coral Precast Ltd. which is a precast company and which operates out of the same location which was formerly used and operated out of by Connolly Marble & Tile Co. Ltd. (which is listed in an accreditation order which will be subsequently referred to herein). The parties also agreed that since this application was filed, the Labourers' Union has signed a collective agreement with Coral Precast Ltd.

8. It was the position of the applicant that its first organizing experience with precast work began in the nineteen fifties when it successfully organized and obtained certificates from the Board for employees in precast manufacturing plants. These employees also worked on construction sites in connection with the installation of precast material. The applicant followed these employees on to the construction sites and organized on-site employees. The applicant was successful in entering into collective agreements with respect to bargaining units of employees engaged in all phases of the erection and finishing of precast concrete products. In 1971 in *Ontario Precast Concrete Manufacturers' Association, Erectors Division*, [1975] OLRB Rep. March 171, the Ontario Precast Concrete Manufacturers' Association, Erectors Division, made an application for accreditation for a unit of employers in the following terms:

All employers of employees engaged in all phases of the erection and finishing of precast concrete products and other components in the building and construction industry within the Province of Ontario.

The Board determined that the appropriate unit of employers was as follows:

All employers of employees engaged in all phases of precast concrete products in the building and construction industry for whom the Labourers' International Union of North America, Ontario Provincial Council has bargaining rights in the Province of Ontario, in the industrial, commercial and institutional sector, the residential sector, the sewers, tunnels and watermains sector, the roads sector and the heavy engineering sector of the construction industry.

9. Following accreditation, collective agreements were entered into which contained the unit referred to in the certificate of accreditation. In 1978, pursuant to sections 139(1)(a) and 139(1)(b) [formerly sections 127(1)(a) and 127(1)(b)], the Minister of Labour made the following designations:

#### EMPLOYEE BARGAINING AGENCY DESIGNATION

Pursuant to clause a of subsection 1 of 127 of The Labour Relations Act, R.S.O. 1970, c.232, as amended, I hereby designate The Labourers International Union of North America and the Labourers International Union of North America Ontario Provincial District Council as the employee bargaining agency to represent in bargaining all employees engaged in the erection and finishing of precast concrete products represented by the following affiliated bargaining agents:

1. The Labourers International Union of North America; or

2. The Labourers International Union of North America Ontario Provincial District Council; or
3. The following Local Unions: 183, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089; or
4. Any other Local of the Labourers International Union of North America which, in the future, may be chartered to represent employees engaged in the erection and finishing of precast concrete products;

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

April 21, 1978

"Bette Stephenson"

Bette Stephenson, M. D.  
Minister

#### EMPLOYER BARGAINING AGENCY DESIGNATION

Pursuant to clause *b* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate the Ontario Precast Concrete Manufacturers' Association as the employer bargaining agency to represent in bargaining all employers whose employees are represented by the following bargaining agents:

1. The Labourers International Union of North America; or
2. The Labourers International Union of North America Ontario Provincial District Council; or
3. The following Local Unions: 183, 247, 491, 493, 506, 527, 607, 625, 749, 837, 1036, 1059, 1081 and 1089; or
4. Any other Locals of the Labourers International Union of North America which, in the future, may be chartered to represent employees engaged in the erection and finishing of precast concrete products;

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and without limiting the generality of the foregoing, to represent in bargaining as aforesaid, all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or

bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

"Bette Stephenson"

April 21, 1978

Bette Stephenson, M. D.  
Minister

A series of collective agreements were entered into since these designations were made. The most recent of these collective agreements were entered into as of June 8, 1986; and remains in effect until April 30, 1988. The heading of the preamble of this collective agreement provides as follows:

**THIS AGREEMENT** entered into as of the 8th day of July, 1986,

**BETWEEN:**

**ONTARIO PRECAST CONCRETE MANUFACTURERS ASSOCIATION,**

(hereinafter collectively referred to as the "Employer Bargaining Agency" - E.B.A. and employers severally referred to as "the Employer"),

**OF THE FIRST PART;**

- and -

**LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, AND THE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL,** on behalf of its Affiliated Local Unions, 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089,

(hereinafter referred to as "the Council"),

**OF THE SECOND PART.**

**WHEREAS** the Council of the E.B.A. are desirous of establishing a form of standard Province Wide Collective Agreement with respect to employees engaged in all phases of **ERECTION** and **FINISHING OF PRECAST CONCRETE** products and other components in the building and construction industry within the geographical area defined herein so as to provide uniform interpretation, application and administration of the relationship established;...

Articles 2.01 and 2.02 of this collective agreement provides:

#### **ARTICLE 2 - RECOGNITION**

2.01 The Employer recognizes the Council as the sole and exclusive bargaining agent for all employees employed in the geographical area covered by this Agreement, save and except non-working foremen and persons above the rank of non-working foreman.

2.02 The Council recognizes the Association as the sole and exclusive bargaining agent for all Employers of employees engaged in all phases of the erection and finishing of precast concrete products and other components in the building and construction industry for whom the Council has bargaining rights in the Province of Ontario, in the industrial, commercial and institutional sector, the residential sector, the sewers, tunnels and watermain sector, the roads sector and the heavy engineering sector of the construction industry.

This collective agreement contains the classifications of general precast labourer, precast erector and finisher, welder (certified) and working foreman.

10. Intervener #1 intervened to protect its bargaining rights and filed a copy of a provincial

collective agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency, which became effective on July 24, 1986, and continues in effect until April 30, 1988, and also filed a copy of a two-page collective agreement signed on December 29, 1986, between the respondent and intervener #1. The two-page collective agreement also became effective on July 24, 1986 and continues in effect until April 30, 1988. The two-page collective agreement states in its preamble and in article 1 as follows:

WHEREAS the Union and the Operating Engineers' Employer Bargaining Agency are parties to a collective Agreement, effective from July 24, 1986 until April 30, 1988 ("the Provincial Collective Agreement");

AND WHEREAS the Union is entitled to represent the employees of the Employer within the bargaining unit hereinafter described;

The Employer and the Union hereby acknowledge and agree as follows:

1. The Employer recognizes the Union as the sole and exclusive bargaining agent for all of its employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, in all sectors of the construction industry in the Province of Ontario and engaged in any such work outside of the construction industry in the said Province.

The provincial collective agreement states in article 2.1 that "The employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer for whom the Union has bargaining rights within the Province of Ontario engaged in work covered by the schedules and classifications set out in this agreement, and any additional classifications as may be agreed to by the parties". In 1978, pursuant to sections 139(1)(a) and 139(1)(b) [formerly sections 127(1)(a) and 127(1)(b)], the Minister of Labour also made the following designations:

#### EMPLOYEE BARGAINING AGENCY DESIGNATION

The designation of the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers representing in bargaining all employees engaged in the operations of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors as amended on April 12, 1978, is further amended by adding thereto the following paragraph:

"Pursuant to subsection 2 of section 127 of The Labour Relations Act I hereby exclude from this designation the bargaining relationship between the Form Work Council of Ontario and the Ontario Form Work Association"

so that the designation reads as follows:

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c.232, as amended, I hereby designate the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers as the employee bargaining agency to represent in bargaining all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, represented by the following affiliated bargaining agents:

1. The International Union of Operating Engineers; or
2. The following Local Union: 793; or
3. Any other Local of the International Union of Operating Engineers which may be chartered in future to represent employees engaged in the operation of cranes, shovels, bulldozers, or similar equipment, or those primarily

engaged in the repairing or maintaining of same, or employees engaged as surveyors

(which Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) Certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) Voluntary recognition agreements with the Unions or any of them;
- (c) Collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

Pursuant to subsection 2 of section 127 of The Labour Relations Act I hereby exclude from this designation the bargaining relationship between the Form Work Council of Ontario and the Ontario Form Work Association.

"Bette Stephenson"

July 13, 1987

Bette Stephenson, M.D.  
Minister

and

#### EMPLOYER BARGAINING AGENCY DESIGNATION

The designation of the Operating Engineers Employers Agency, consisting of the Canadian Association of Foundation Specialists, Crane Rental Association of Ontario, Industrial Contractors Association of Canada, Labour Relations Bureau of Ontario General Contractors Association, Ontario Erectors Association, Ottawa Crane Rental Association, Toronto and District Excavators Association and Heavy Equipment Services Section of the Windsor Construction Association dated March 31, 1978 is hereby amended by adding thereto the following paragraph:

"Pursuant to subsection 2 of section 127 of The Labour Relations Act I hereby exclude from this designation the bargaining relationship between the Form Work Council of Ontario and the Ontario Form Work Association"

so that the designation reads as follows:

Pursuant to clause *b* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c.232, as amended I hereby designate the Operating Engineers Employers Agency, consisting of the Canadian Association of Foundation Specialists, Crane Rental Association of Ontario, Industrial Contractors Association of Canada, Labour Relations Bureau of Ontario General Contractors Association, Ontario Erectors Association, Ottawa Crane Rental Association, Toronto and District Excavators Association and Heavy Equipment Services Section of the Windsor Construction Association, as the employer bargaining agency to represent in bargaining all employers whose employees are represented by the following affiliated bargaining agents:

1. The International Union of Operating Engineers; or
2. The following Local Union: 793; or
3. Any other Local of the International Union of Operating Engineers which in the future may be chartered to represent employees engaged in the operation of cranes, shovels, bulldozers, or similar equipment, or those prima-

rily engaged in the repairing or maintaining of same, or employees engaged as surveyors

(which Unions are hereinafter collectively referred to as "the Unions", in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and without limiting the generality of the foregoing, to represent in bargaining as aforesaid, all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

Pursuant to subsection 2 of section 127 of The Labour Relations Act I hereby exclude from this designation the bargaining relationship between the Form Work Council of Ontario and the Ontario Form Work Association.

"Bette Stephenson"

July 13, 1978

Bette Stephenson  
Minister

12. Intervener #2 intervened and claimed that this application was untimely by virtue of the existing collective bargaining relationship between the respondent and intervener #2. The respondent and intervener #2 signed a voluntary recognition and acknowledgement agreement dated August 10, 1978, whereby the respondent recognized intervener #2 as the exclusive bargaining agent for ironworkers in its employ in the Province of Ontario. In this voluntary recognition and acknowledgement agreement the respondent also acknowledged that it is bound by the terms of the collective agreement between the Ontario Erectors Association and the International Association of Bridge, Structural and Ornamental Ironworkers and The Ironworkers District Council of Ontario, of which intervener #2 is a member. This collective agreement became effective May 1, 1986, and remains in effect until April 30, 1988. Article 1.5 of this collective agreement provides, in part, as follows:

1.5 This Agreement shall apply to all of the employees of an Employer within the Province of Ontario, save and except persons above the rank of General Foreman (it is understood that General Foremen are not required to be Union members except as noted in Article 1.6), who are engaged in, but not necessarily limited to the following, which shall include all field maintenance work undertaken by the Employer. Terms and conditions of this Agreement may be modified on maintenance work by the mutual consent of the parties to this Agreement when they deem it prudent.

\* \* \*

(b) *Precast, prestressed, reinforced concrete, structural and architectural members* for buildings, bridges, and other structures including modular designed buildings:

Where precast, prestressed, reinforced concrete, structural and architectural members (columns, beams, girders, slabs, fascia panels, etc.) are used in the construction of buildings, bridges, and other structures and power equipment such as derricks, cranes, jacks, and/or rigging is used, work of loading, unloading, moving, and placing to complete erection shall be performed by Members of the Union.

[emphasis added]

This collective agreement contains classifications for journeymen ironworkers, ironworkers' apprentices, riggers, welders and fence erectors. A note within the classifications states that the classification of journeymen ironworker "includes but is not limited to the following job titles: machinery movers, window mechanics, *precast erectors*, pile driver, ornamental and miscellaneous steel erectors, erector mechanics (hoist and crane), finishers (window and curtain wall installers), sheeters, layout men, field fabricators, structural erectors". [emphasis supplied]

13. In 1978 and 1982, pursuant to section 139(1)(a) [formerly section 127(1)(a)] and section 139(1)(b), the Minister of Labour made the following current designations:

EMPLOYEE BARGAINING AGENCY DESIGNATION

The designation of the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario dated March 21, 1978, is amended by substituting the word "employees" for the word "employers" in the twenty-third line thereof; so that the designation reads as follows:

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario as the employee bargaining agency to represent in bargaining all ironworkers, save and except rodmen, represented by the following affiliated bargaining agents:

1. International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario; or
2. the following Local Unions: 700, 721, 759, 765, 736, 786; or
3. any other Local of the International Association of Bridge, Structural and Ornamental Iron Workers which in the future may be chartered to represent ironworkers,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

This designation is made subject to the conditions that the Ironworkers District Council of Ontario file with my office before April 30, 1978, the appropriate amendments to their by-laws to enable the District Council to act as a designated bargaining agency.

"Bette Stephenson"

Bette Stephenson, M.D.  
Minister

April 12, 1978

and

### EMPLOYER BARGAINING AGENCY DESIGNATION

The designation of the Ontario Erectors Association is hereby revoked and the following substituted therefor:

Pursuant to clause b of subsection 1 of section 139 of the Labour Relations Act, R.S.O. 1980, c. 228, I hereby designate the Ontario Erectors Association, Incorporated, as the employer bargaining agency to represent in bargaining all employers whose ironworker employees are represented by the following affiliated bargaining agents:

1. International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario; or
2. the following Local Unions: 700, 721, 759, 765, 736, 786; or
3. any other Local of the International Association of Bridge, Structural and Ornamental Iron Workers which in the future may be chartered to represent ironworkers,

(which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

"R. H. Ramsay"

R. H. Ramsay  
Minister

May 26, 1982

14. The applicant argued that it was entitled to be certified for the bargaining unit set forth in its application. The applicant relied upon the provisions of section 139(1) of the *Labour Relations Act* and reasoned that the Minister had exercised his power to designate and describe an employee bargaining agency to represent in bargaining provincial units of affiliated bargaining agents and to describe those provincial units with the corresponding designation with respect to the employers' organization. The applicant referred to section 144(1) and stated that its application for certification as a bargaining agent related to the industrial, commercial and institutional sector of the construction industry. The applicant pointed out that the unit of employees "shall include all employees who would be bound by a provincial agreement". The applicant referred to the provisions of section 146(1) and adopted the position that its proposed bargaining unit was the unit contemplated by sections 144(1) and 146(1). The applicant differentiated between the description of provincial units and the description of the jurisdiction which may be claimed by a trade union. The applicant relied on an earlier unreported decision in which the Board issued a certificate to the applicant with respect to the identical bargaining unit sought by the applicant in this application. (See 619138 *Ontario Limited*, Board File No. 1785-86-R, decision dated October 22, 1986). The applicant further argued that there was nothing in the collective agreement of either of the interveners which was a bar to this application.

15. Intervener #1 argued that the appropriate bargaining unit ought to be restricted to con-

struction labourers rather than be defined in terms of the broader all employee bargaining unit. Intervener #1 informed the Board that the applicant assured it that the applicant had no designs on intervener #1's jurisdiction. In these circumstances, intervener #1 wondered why the applicant was not agreeable to having the appropriate bargaining unit described in terms of all construction labourers engaged in the erection and finishing of precast concrete products in the industrial, commercial and institutional sector of the construction industry. In the alternative, intervener #1 proposed an appropriate bargaining unit defined in terms of the applicant's proposed unit with the exclusion of employees covered by subsisting collective agreements.

16. Intervener #2 argued that the bargaining unit as defined in the application was too broadly framed and raised jurisdictional difficulties. It was also the position of the intervener that the appropriate bargaining unit ought to be restricted to construction labourers rather than be defined in terms of the broader all employee bargaining unit. As a second choice, intervener #2 suggested an appropriate bargaining unit defined in terms of all construction labourers engaged in the erection and finishing of precast concrete products. The issue from the point of view of intervener #2 was that this application for certification was an attempt to express a portion of a bargaining in terms of the work done rather than in terms of the more normal generic reference to a trade. Intervener #2 submitted that to describe the unit by the work done and not by a generic reference would be a departure by the Board from its normal practice. Intervener #2 argued that the Board's standard practice of describing bargaining units in generic terms ought to be applied to this application and that the bargaining unit ought to be described in the terms of construction labourers despite the wording of both the designations and the collective agreements affecting precast concrete products. It was the position of intervener #2 that the issue of the appropriate bargaining unit is a separate issue and that despite the wording of the designation, the Board should exercise its unfettered jurisdiction and not define the bargaining unit in terms of all employees. Intervener #2 also argued that this application was untimely because of the existing provincial collective agreement binding on the respondent and intervener #2. Article 1.5(b) was referred to and intervener #2 argued that precast concrete work was to be performed by members of intervener #2. It followed that the employees affected by this application were already covered by the existing provincial collective agreement binding on the respondent and intervener #2 and that having regard to the provisions of sections 5(4) and 146(3) of the *Labour Relations Act* this application was untimely.

17. The respondent pointed out that only the precast concrete designation and the operating engineers' designation were defined in terms of the work covered and that all of the other designations were expressed in generic terms of the trades. The respondent urged the Board to minimize the problem caused by the all employee precast concrete designation and to do what it could to minimize jurisdictional disputes. The respondent argued that the Board ought to interpret the "all employees" words of the precast concrete designation so as to mean employees not covered by other designation orders. The respondent submitted that there was nothing in the *Labour Relations Act* which compelled the Board to adopt the wording of the designations in defining appropriate bargaining units. It was the position of the respondent that the appropriate bargaining unit ought to be defined in terms of all construction labourers engaged in the erection and finishing of precast concrete products. The respondent did not adopt any position on intervener #2's claim that this application was untimely.

18. This is an application which relates to the industrial, commercial and institutional sector of the construction industry. Under the provisions of section 144(1) of the *Labour Relations Act* the unit of employees is required to include all employees who would be bound by a provincial agreement. The term "provincial agreement" as defined in section 137(1)(e) embraces an agreement in writing between a designated employer bargaining agency and a designated employee bar-

gaining agency that represents affiliated bargaining agents. The Minister has made the designations referred to earlier under section 139(1) with respect to the erection and finishing of precast concrete products and has described the provincial unit with respect to the erection and finishing of precast concrete products. There are only two designations that are not expressed in generic terms. These two designations are with respect to operating engineers and also with respect to the erection and finishing of precast concrete. The designation with respect to operating engineers which was referred to earlier in paragraph ten makes the designation of the employee bargaining agency to represent in bargaining all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing and maintaining of same. This portion of the designation order is identical to the craft bargaining unit which the Board has found to be appropriate in applications for certification which have been made by intervenor #1. Such bargaining units are in effect generic in nature since the description of the unit refers to the craft of the operating engineers. The Board routinely issues certificates to intervenor #1 in terms which are identical to the portion of the designation for operating engineers.

19. In the instant application for certification, the applicant is seeking certification for a bargaining unit of employees in the same terms as those set forth in the designation with respect to the erection and finishing of precast concrete products. The reference in the designation referred to earlier in paragraph nine makes the designation of the employee bargaining agency to represent in bargaining all employees engaged in the erection and finishing of precast concrete products. This portion of the designation is identical to the bargaining units for which the applicant had bargaining rights both prior to and after the certificate of accreditation which was issued by the Board in 1975. The bargaining unit for which the applicant is seeking certification has been bargained for by the applicant affiliated bargaining agent of the employee bargaining agency and the employer bargaining agency for approximately two decades. More recently the Board issued a certificate in the terms presently sought by the applicant in the instant application in *619138 Ontario Limited, supra*.

20. The concern of the interveners and their opposition to this application centres on matters of jurisdiction rather than on bargaining rights. It has long been the practice of the Board to define bargaining units in terms of trades and not in terms of the work to be performed. See, for example, *Acadia Engineering Limited*, [1970] OLRB Rep. Dec. 986. However, bargaining rights and work jurisdiction are not precisely related in that bargaining rights which are obtained by an affiliated bargaining agent do not in themselves confer any particular work jurisdiction. In *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, at page 1034, the Board stated:

... In the Board's view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under the *Labour Relations Act*, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a sub-contracting provision. Sections 56 and 59 of the Act are intended to protect bargaining rights only, and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 80 [now section 91] of the Act for the resolution of jurisdictional disputes.

The Board does not regard a certification proceeding as an appropriate mechanism for determining the jurisdictional limits of trade unions or affiliated bargaining agents in the construction industry. Difficulties which may occur in the future concerning jurisdictional disputes which the parties are

not able to resolve may be referred to the Board under the provisions of section 91. See *Industrial Lighting and Contracting Limited*, [1979] OLRB Rep. Oct. 985. The Board notes that section 91 in providing a complaint procedure and resolution mechanism for jurisdictional disputes also confers upon the Board the power in section 91(15) and (16) to alter bargaining units defined in certificates or in collective agreements.

21. There is nothing in the collective agreement which is binding on the respondent with respect to operating engineers which constitutes a bar to this application. With respect to the collective agreement which is binding on the respondent with respect to ironworkers, the Board notes that this collective agreement is a multi-sector collective agreement which extends beyond the industrial, commercial and institutional sector. While this collective agreement defines ironworker to include precast erectors and makes jurisdictional claims for precast work, it is not open for this collective agreement to purport to cover the employees referred to in the designation order under which the applicant is an affiliated bargaining agent under the provisions of section 146(1) and (2). See also *EKT Industries Inc.*, [1987] OLRB Rep. March 352.

22. I would have certified the applicant for the bargaining unit which it requested. I do not agree with the decision of the majority. I note that under the provisions of section 139(1) the Minister may designate employee bargaining agencies and employer bargaining agencies. The Minister has made the designation under section 139(1)(a) and has described the provincial unit in terms of "all employees" rather than "all construction labourers". Section 146(1) provides that an employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents. In my view the respondent, upon certification, will be covered by the one and existing provincial collective agreement between the Ontario Precast Concrete Manufacturers Association and the employee bargaining agency regardless of the bargaining unit determined and granted by the majority.

#### **DECISION OF BOARD MEMBERS H. KOBRYN AND D. A. MacDONALD;**

1. The name of the respondent is amended to read: "Sinclair Welding Ltd."

2. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 21, 1978, the designated employee bargaining agency is The Labourers International Union of North America and The Labourers International Union of North America Ontario Provincial District Council.

3. We further find that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together

with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

4. This is an application which relates to the industrial, commercial and institutional sector of the construction industry. Under the provisions of section 144(1) of the *Labour Relations Act* the unit of employees is required to include all employees who would be bound by a provincial agreement. The Minister has made the designations referred to earlier under section 139(1) with respect to the erection and finishing of precast concrete products and has described the provincial unit with respect to the erection and finishing of precast concrete products. However, the question of the description of a bargaining unit and the wording of the designation are not co-extensive. The Board has an unfettered discretion in determining the appropriate bargaining unit. As the Board stated in *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166, at page 1175:

Therefore, even though the wording of section 144(1) allows what the carpenters are seeking, the Board still retains authority under section 6(1) of the Act to determine whether the unit would be appropriate. There are sound labour relations policy reasons why it would not be appropriate.

Again in *Ninco Construction Ltd.*, [1982] OLRB Rep. November 1692, the Board declined to follow the precise wording of an employee bargaining agency designation order where the circumstances and sound labour relations required otherwise. At pages 1193-4 the Board stated as follows:

6. At the hearing, counsel for the applicant contended that any bargaining unit fashioned by the Board should expressly include not only construction labourers but also "all employees engaged in cement finishing, waterproofing or restoration work". This phrase is utilized in both the labourers' employee bargaining agency designation and the labourers' provincial agreement. Presumably the phrase found its way into the designation because of its use in collective agreements entered into by various Ontario locals of the Labourers' International Union prior to the advent of provincial bargaining. To our knowledge, except for displacement applications where the wording had previously been utilized by the employer and the incumbent union, the Board has never recognized employees engaged in cement finishing, waterproofing or restoration work as being one or more separate trades or classifications of employees for certification purposes. Indeed, the Board's experience is that the types of work involved can, and have been, performed by members of more than one trade. We are not satisfied on the material before us that the Board should now begin to describe bargaining units in these terms. However, in that on the application date the respondent did have employees engaged in cement finishing work, we think it appropriate to describe the bargaining unit in terms of construction labourers but to specify in a clarity note that employees performing this type of work do come within the scope of the bargaining unit. In that the respondent had no employees engaged in waterproofing or restoration work at the relevant time, we do not feel it appropriate to include a similar clarity note relating to this type of work.

5. There are other examples where the Board does not describe the appropriate bargaining unit in terms of the wording used in an employee bargaining agency designation order. An example occurs in the designation order of the Operating Engineers. In that designation order the wording is for operating engineers and employees engaged as surveyors. The Board has never included operating engineers in the same bargaining unit as employees engaged as surveyors. Moreover, in determining an appropriate bargaining unit of surveyors, the Board has generally described such a bargaining unit in more specific terms than "all employees engaged as surveyors". For a discussion of bargaining units of surveyors and designation orders see *Stone & Webster Canada Limited*, [1987] OLRB Rep. April 607. Another example occurs where the Board determines an appropriate bargaining unit of plumbers and pipefitters and adds a clarity note that welders are included in the bargaining unit where welders have been employed at the relevant time. The Board does this even though welders are not referred to in the employee bargaining agency designation

order. The Board is not rigidly tied to the wording of employee bargaining agency designation orders.

6. In an earlier decision of the Board in *619138 Ontario Limited*, Board File No. 1785-86-R, decision dated October 22, 1986, a differently-constituted panel of the Board issued a certificate which contained a bargaining unit which is identical to the bargaining unit which the applicant is seeking in the instant application. However, in that decision the Board did not have the benefit of the arguments which were raised in this application. This earlier decision in 1986 was arrived at without a hearing being held. In our view, the earlier decision is not persuasive authority.

7. In the construction industry the Board has always been sensitive to the possibility of jurisdictional disputes and to this end has generally avoided an all employee bargaining unit. In *A.K. Penner & Sons Ltd.*, [1966] OLRB Rep. Oct. 493 the Board stated:

The problems of "craft" versus "all employee" units present more difficulties. It is clear that in the past the Board has granted all employee units in construction industry cases to, *inter alia*, the present applicant. See for example, *Saville Construction Company Limited*, O.L.R.B. Monthly Report, October 1964, p. 305, and *R. E. Lee Construction Co. Ltd.*, O.L.R.B. Monthly Report, September 1965, p. 395. It is also true that the Board has refused to grant such a unit where trades intended to be employed in the future were not employed on the date of the making of the application. See *Mannix Co. Ltd.*, O.L.R.B. Monthly Report, January 1965, p. 526. In the latter case, the Board indicated that the likelihood of work assignment or jurisdictional disputes was a factor which ought to be taken into consideration in determining the appropriate bargaining unit. This factor, in our view, assumes an even greater significance now that the Board has been given wide powers to deal with work assignment disputes. *In future, therefore, where a union which normally organizes along craft lines seeks an all employee bargaining unit one of the factors to be considered is the likelihood of the granting of such a unit leading to a work assignment or jurisdictional dispute.* We should perhaps add at this point that we agree with the applicant's submission that section 90(b) [now section 106(f)] of The Labour Relations Act is not so worded as to preclude a trade union which normally organizes along craft lines from applying for an all employee unit in a construction industry application.

[emphasis added]

The Board elaborated on and confirmed this approach in *Winter and Son Limited*, [1967] OLRB Rep. Feb. 889.

8. On the facts of this application there are competing jurisdictional claims by both interveners which cast a shadow over an all employee bargaining unit. In our view the best interests of labour relations would be served by confining the appropriate bargaining unit to construction labourers. Conflicts among the applicant and the interveners are more appropriately dealt with as a jurisdictional dispute under the provisions of section 91.

9. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designated issued by the Minister under section 139(1) of the Act on April 21, 1978, the designated employee bargaining agency is the Labourers International Union of North America and the Labourers International Union of North America Ontario Provincial District Council.

10. We further find that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which related to the industrial, commercial

and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

11. For the foregoing reasons, we find that all construction labourers in the employ of the respondent engaged in the erection and finishing of precast concrete products in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent engaged in the erection and finishing of precast concrete products in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. We are satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 9, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade union as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all construction labourers in the employ of the respondent engaged in the erection and finishing of precast concrete products in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

14. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent engaged in the erection and finishing of precast concrete products in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industri-

al, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**0128-87-G; 0129-87-G** International Brotherhood of Painters and Allied Trades, Local 1795, Applicant v. **Walpat Glass & Aluminum Products Ltd.** and **M & I Aluminum Ltd.**, Respondents; International Brotherhood of Painters and Allied Trades, Local 1819, Applicant v. **Walpat Glass & Aluminum Products Ltd.** and **M & I Aluminum Ltd.**, Respondents

**Construction Industry Grievance - Practice and Procedure - Principals of respondents failing to appear at hearing although given notice and properly subpoenaed - Board issuing Sheriff's warrant for their arrest - Board's authority to issue arrest warrants reviewed**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *J. Wilson* and *H. Kobryn*.

**APPEARANCES:** *Stanley Simpson*, *G. McMenemy* and *J. Kemp* for the applicant; no one for the respondents.

**DECISION OF THE BOARD;** July 22, 1987

1. These are two applications made pursuant to section 124 of the *Labour Relations Act*. In each case, the applicant union contends that the respondents have failed to abide by the terms of a collective agreement by which they are bound. A hearing in these matters was scheduled to take place, and did take place, in Toronto on July 13, 1987. In order to put the issue before us in context, it is probably useful to sketch in some background. Some of this background has already been set out in an earlier Board decision involving the same parties; however, it does no harm to repeat it here.

2. On March 21, 1986, the applicant "Local 1819" was certified to represent the employees of the respondent "Walpat" in the ICI sector and the non-ICI sectors of the construction industry, for Board Area No. 8 (see Board File No. 2572-85-R). Subsequently, the principals of Walpat, Isaac Walter and Moti Patel formed a new company, M & I Aluminum Ltd., which continued to carry on a similar business. In effect, Walpat ceased operating and became a largely dormant company.

3. In response to this situation the union(s) applied to the Board for a declaration either that "M & I" was a related employer under section 1(4) of the *Labour Relations Act*, or that the "business" of Walpat had been transferred to M & I. In due course those applications came on for a hearing before the Board (differently constituted). For reasons, and based on factual findings more particularly set out in the Board's decision of June 5, 1987, the Board declared that Walpat Glass & Aluminum Products Limited and M & I Aluminum Ltd. were one employer for the purposes of the *Labour Relations Act*. The Board further declared that M & I Aluminum Ltd. was bound to the collective agreement between Walpat and the union. The Board then noted that the section 124 grievance referrals (the present proceedings) had been held in abeyance pending a decision on the successor rights/related employer issue, and that they could now be listed for hearing. They were; and, as noted, came on before us on July 13, 1987.

4. Notice of hearing was served on the respondents in accordance with the Board's Rules. There is no doubt that the respondents were aware of the hearing. By letter dated July 2nd, 1987, Mr. Patel and Mr. Walter wrote the Board as follows:

This will serve to advise that we would ask that the hearing scheduled for July 13th, 1987, be cancelled as the outcome of our appeal of the board's decision, outlined in our letter dated June 29th, 1987, is pending. Consequently, the hearing is inappropriate.

The reference to an "appeal" is, properly speaking, a request for reconsideration of the earlier Board decision. Attached to the letter of July 2nd, 1987, requesting a cancellation of the scheduled hearing, are two true copies of a Summons To Witness issued to both Mr. Walter and Mr. Patel over the signature of a Board Vice-Chair. The text of the Summons To Witness or "subpoena", in each case, reads as follows:

You are hereby summoned and required to attend before the Ontario Labour Relations Board at a hearing to be held at the Board Room, 400 University Avenue, Toronto, Ontario on Monday, the 13th day of July 1987, at the hour of 9:30 o'clock in the forenoon, (local time) and so from day to day until the hearing is concluded or the tribunal otherwise orders, to give evidence on oath touching the matters in question in the proceedings and to bring with you and produce at such time and place all documents, papers, writings relating to any matters in issue which are or have been in your possession, custody or power and especially all payroll records of both M & I Aluminum Ltd. and Walpat Glass & Aluminum Products Ltd. up to and including the present date especially all jobs done or bid by M & I Aluminum Ltd. and/or Walpat Glass & Aluminum Products Ltd. from on or about March 21st, 1986 up to and including the present date.

5. Although given notice of the hearing and properly subpoenaed to appear, neither Mr. Walter nor Mr. Patel did so. Accordingly, the union urges the Board to issue a Sheriff's warrant for their arrest so that the Board can insure and direct compliance with its summons. The Board's authority to do so is provided in the *Labour Relations Act* itself and has been affirmed in *Re International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and Master Insulators Association of Ontario, et al*, (1979) 25 O.R. (2d) 9, at page 13. It was further discussed in *Casalbil Contractor Limited*, [1980] OLRB Rep. Sept. 1278:

4. ... The Board is given the authority under the Act to enforce the attendance of a witness in the same manner as a court of record in civil cases. In Ontario, a court of record in civil cases has the authority to issue a warrant for the arrest of a person who has been duly served with a summons but has failed to appear. (See 26 C.E.D. (Ont. 3rd) 114-366, paragraph 673; Rule 275, Supreme Court of Ontario Rules of Practice.) The issuing of a warrant directed to the Sheriff to bring a person before the Board is to be distinguished from punishing a person for contempt committed in the face of the Board. The Board, in issuing such a warrant, is not punishing the witness for failing to attend. Indeed, it is our view that we cannot impose punishment for such action. (See *Re: Hawkins and Halifax County Residential Tenancies Board*, (1974), 47 D.L.R. (3d) 117 (N.S.S.C.).) Rather, it is ensuring that the witness attend before the Board to give evidence pursuant to a summons duly issued and served. However, should a witness refuse to testify after having been brought before the Board and after being directed by the Board to testify, such refusal may well constitute grounds for punishment by way of fine or imprisonment for contempt committed in the face of the Board. (See *Re: Diamond and Ontario Municipal Board*, [1962] O.R. 328; 32 D.L.R. (2d) 103.)

5. The Board may, therefore, enforce the attendance of a witness duly served with a summons and conduct money by issuing a warrant directing the Sheriff to arrest the witness and bring him before the Board if the party seeking such an order can establish that the witness was properly served with a summons and sufficient conduct money and that the presence of the witness is material to the ends of justice.

To the same effect is the decision of the Board in *Rino Zanette (1981) Ltd.*, [1986] OLRB Rep.

Nov. 1572 - a case in which an employer refused to provide information required of him by a summons. There the Board said this:

17. In approaching the contempt issue in the manner set out above, we had in mind the powers conveyed to the Board by the *Labour Relations Act* when it acts as an arbitration board. In proceedings before the Board under provisions other than section 124 of the *Labour Relations Act*, where a witness refuses to answer a question to which the Board may legally require an answer, a case may be stated to the Divisional Court, pursuant to section 13 of the *Statutory Powers Procedure Act* (the "S.P.P.A.") and that Court may inquire into the matter and punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the Court. However, section 3(2)(d) of the S.P.P.A. provides that Part I of the S.P.P.A. (which consists of sections 2 to 25 of that legislation) does not apply to proceedings before an arbitrator to which the *Labour Relations Act* applies. Since the Board is acting as an arbitrator when dealing with matters under section 124 of the Act, the enforcement mechanisms contained in Part I of the S.P.P.A. are inapplicable: *Casabil Contractor Limited*, [1980] OLRB Rep. Sept. 1278, and *Re International Association of Heat and Frost Insulator and Asbestos Workers, Local 95* (1979), 25 O.R. (2d) 8. However, subsection 124(3) of the Act provides that the Board has the powers set out in subsection 44(8) of the Act when it deals with a referral of a grievance to the Board. Subsection 44(8)(a) provides as follows:

44(8) An arbitrator or the chairman of an arbitration board, as the case may be, has power,

- (a) to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases; ...

18. At common law, an inferior Court of Record could commit to prison or fine when confronted with contempt in the face of the Court. (See, *Re Diamond and The Ontario Municipal Board*, [1962] O.R. 328). A necessary implication of the powers given to the Board by subsection 44(8)(a) is the power to punish for disobedience of its orders. When the legislature gave the Board the powers of a court of record in civil cases, it conveyed to the Board the authority to fine or commit to prison, or both, for contempt committed in the face of the tribunal. The contempt the Board can address is civil in nature. While the power to punish for contempt is necessary for the proper administration of justice, the Board exercises the power cautiously. Without the power to punish for contempt in the face of the Board, the Board would have considerable difficulty in discharging its functions. Although the following comments of Schroeder, J.A., in *Re Diamond and the Ontario Municipal Board*, *supra*, were made in relation to the OMB, they apply with equal validity to the Labour Relations Board.

"It is necessary in many cases for the Board, in discharging its functions, to ascertain the facts with which it has to deal, and in the conduct of its enquiries it is essential that it possess incidental powers commonly associated with a Court of justice. If it were not invested with the power to punish a witness who refuses to be sworn or to affirm (as the case may be) or who, having been sworn or having affirmed, refuses to answer a question when directed to do so, the administrative machinery of the Board would soon grind to a halt, for the most effective direct sanction commonly available to compel obedience to such an order or direction is the power to hold a recalcitrant witness in contempt and, as a means of coercion, to commit him to prison."

When faced with the ultimate prospect of fine or imprisonment, the witness in *Zanette* ultimately opted to provide the information required of him, so no such sanctions were necessary.

6. In the instant case, on the basis of the evidence before us, we are satisfied that Isaac Walter and Moti Patel were duly summoned to appear and give evidence at the hearing before the *Ontario Labour Relations Board* on July 13, 1987 and to produce the documents more particularly specified in the text of the summons. We are further satisfied that the presence of these two witnesses is material to the ends of justice, and that both of them have failed to attend in accordance with the requirements of the summons. We are persuaded therefore to issue a warrant to the Sher-

iffs and other Peace Officers in the Province of Ontario for the arrest of both defaulting witnesses. A copy of those arrest warrants are attached as Appendix A to this decision.

7. We do not wish to leave this matter without making some concluding observations.

8. We note that in the earlier proceeding before the Board, the respondents were not represented. They chose to appear in a legal forum, to address legal issues, without being represented by legally-trained counsel - let alone counsel experienced in contentious labour law matters. In the instant case, although duly summoned to appear, they have chosen not to do so. It is difficult to resist the conclusion that the principals of the respondents do not fully appreciate the *potential* consequences of their acts or the *potential* liability which they might face if the Board should determine that their legal position should not be sustained. The Board's proceedings are often less formal and technical than those of a Court - particularly if one or both parties are unrepresented by counsel; however, parties appearing before the Board should not doubt its legal authority or the binding force of its decisions. Any questions in that regard were dispelled by the decision of the Divisional Court in *Master Insulators Association of Ontario, et al, supra*, where the Board doubted its own authority to punish a witness who refused to answer questions, and the Court emphatically disagreed. Similarly, it must be remembered that any decision issued pursuant to section 124 of the Act will ultimately be enforceable as if it were a judgement of the Supreme Court of Ontario. Accordingly, we respectfully suggest that, if they have not already done so, the principals of the respondents take the advice of a solicitor who understands the legal context and process in which they are now involved.

9. Having regard to the foregoing, the Board will issue an arrest warrant in the usual form (see the attached Appendix) requiring the presence of the summoned witnesses on August 31st and September 1st, the dates which we hereby fix for continuation of this matter.

10. This particular panel is not seized of the merits of this case.

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[Appendix omitted: Editor]

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## CASE LISTINGS JUNE 1987

	PAGE
1. Applications for Certification .....	157
2. Applications for Declaration of Related Employer.....	174
3. Sale of a Business .....	175
4. Union Successor Status .....	176
5. Applications for Declaration Terminating Bargaining Rights.....	176
6. Applications for Declaration of Unlawful Strike .....	178
7. Applications for Declaration of Unlawful Strike (Construction Industry) .....	178
8. Complaints of Unfair Labour Practice .....	178
9. Applications for Determination of Employee Status.....	181
10. Complaints Under the Occupational Health & Safety Act .....	181
11. Complaints Under the Atomic Energy Control Act .....	181
12. Construction Industry Grievances .....	181
13. Applications for Reconsideration of Board's Decision .....	184



## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1987

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**1245-85-R:** The Carpenters' District Council of Toronto & Vicinity on behalf of Locals 27 & 1304, United Brotherhood of Carpenters' & Joiners of America (Applicant) v. Hemco Developments Limited (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**2071-85-R:** The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Mette Plumbing Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough, and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit) (*Having regard to the agreement of the parties*)

**2701-85-R:** Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. VS Services Ltd. (Respondent)

Unit #1: "all employees of the respondent at Eaton Yale in Chatham, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and those employees in any bargaining unit for which a trade union held bargaining rights as of February 4, 1986" (7 employees in unit)

Unit #2: "all employees of the respondent at Eaton Yale in Chatham, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, and those employees in any bargaining unit for which a trade union held bargaining rights as of February 4, 1986" (7 employees in unit)

**3126-85-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hayloft Steakhouse Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except managers and those above the rank of manager" (55 employees in unit) (*Having regard to the agreement of the parties*)

**0376-86-R; 0389-86-R:** Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. Group of Employees (Objectors)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

Unit #3: "all construction labourers in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

**1359-86-R:** United Food & Commercial Workers International Union (Applicant) v. Cobi Foods Inc. (Respondent)

Unit: "all employees of the respondent at Whitby, Ontario, save and except fieldmen, forepersons, persons above the rank of foreperson, office and sales staff, and employees for which any trade union held bargaining rights as of July 31, 1986" (34 employees in unit) (*Having regard to the agreement of the parties*)

**2100-86-R:** Ontario Nurses' Association (Applicant) v. Medi-Park Lodges Inc., c.o.b. as Valley Park Lodge, Niagara Falls (Respondent)

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity at Valley Park Lodge in Niagara Falls, save and except the Director of Nursing and those above the rank of Director of Nursing" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**2414-86-R:** Textile Processors, Services Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Walker Atlantic Glass Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at 175 Commander Blvd., Scarborough, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (80 employees in unit) (*Having regard to the agreement of the parties*)

**2817-86-R:** International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Graff Diamond Products Limited (Respondent) v. Labourers' International Union of North America, Local 506, Labourers' International Union of North America, Ontario Provincial District Council (Intervenors)

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**3096-86-R:** United Steelworkers of America (Applicant) v. Kenoyd Limited, trading as Pickering Welding & Steel Supply (Respondent)

Unit: "all employees of the respondent working at and out of Bowmanville save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

**3152-86-R:** United Food & Commercial Workers' International Union, Local 175 (Applicant) v. Peter Piper Inn Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

Unit #2: "all employees of the respondent in the City of Sudbury, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except office, clerical and front desk staff, Assistant General Manager and those above the rank of Assistant General Manager" (57 employees in Unit) (*Having regard to the agreement of the parties*)

**3234-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Nickey Holdings Ltd. and Maddalena Holdings Ltd., c.o.b. as Artistic Railings (Respondent)

Unit: "all carpenters, carpenters' apprentices, labourers, ironworkers and ironworkers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**3282-86-R:** Ontario Nurses' Association (Applicant) v. Brantwood Residential Development Centre (Respondent)

Unit #1: "all registered and graduate nurses, engaged in a nursing capacity, of the respondent, in Brantford, save and except the director of residential services, persons above the rank of director of residential services and persons regularly employed for not more than 24 hours per week" (3 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses, engaged in a nursing capacity, of the the respondent, regularly employed for not more than 24 hours per week, save and except the director of residential services and persons above the rank of director of residential services" (3 employees in unit) (*Having regard to the agreement of the parties*)

**3430-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Man Construction, Division of 600880 Ontario Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

**3484-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. East-West Construction Co. Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of

Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0023-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Glenway Builders Limited, Humedale Designer Homes, Ferrante Home Improvement & Landscaping (Respondents)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

**0139-87-R:** United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. 637532 Ontario Inc., c.o.b. as Plantation Motor Hotel (Respondent)

Unit #1: "all employees of the respondent in the City of Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons regularly employed for not more than 24 hours per week" (15 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Hamilton, Ontario, regularly employed for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (15 employees in unit) (*Having regard to the agreement of the parties*)

**0169-87-R:** Ontario Nurses' Association (Applicant) v. The Ontario Cancer Institute, incorporating The Princess Margaret Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Metropolitan Toronto, save and except head nurses, persons above the rank of head nurse, nursing education teachers, psychosocial liaison nurses, persons employed as project co-ordinator patient education and quality assurance personnel" (238 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0186-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Lincoln County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel, in Lincoln County, save and except employees in bargaining units for which any trade union held bargaining rights as of April 21, 1987" (90 employees in unit) (*Having regard to the agreement of the parties*)

**0187-87-R:** Ontario Nurses' Association (Applicant) v. Algoma Health Unit (Respondent)

Unit #1: "all registered and graduate nurses employed by the respondent in its Home Care Unit in Sault Ste. Marie, Elliot Lake, Blind River and Wawa, save and except the assistant administrator, persons above the rank of assistant administrator and persons regularly employed for not more than 24 hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses regularly employed for not more than 24 hours per week by the respondent in its Home Care Unit in Sault Ste. Marie, Elliot Lake, Blind River and Wawa, save and except the assistant administrator and persons above the rank of assistant administrator" (5 employees in unit) (*Having regard to the agreement of the parties*)

**0236-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Trumbley Hampton Inc. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**0248-87-R:** United Steelworkers of America (Applicant) v. 656955 Ontario Limited, c.o.b. as Pinecrest Nursing Home (Respondent)

Unit: "all employees of the respondent in Plantangenet, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

**0249-87-R:** United Steelworkers of America (Applicant) v. 656955 Ontario Limited, c.o.b. as Pinecrest Nursing Home (Respondent)

Unit: "all employees of the respondent in Plantangenet regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

**0260-87-R:** Ontario Public Service Employees Union (Applicant) v. Stothers Centre for Children and Families (Respondent)

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, confidential secretary, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and confidential secretary" (3 employees in unit) (*Having regard to the agreement of the parties*)

**0268-87-R:** Ontario Nurses' Association (Applicant) v. Christie Park Nursing Homes Ltd. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week" (3 employees in unit) (*Having regard to the agreement of the parties*)

**0279-87-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Ault Foods Limited (Respondent)

Unit: "all office, clerical and technical employees of the respondent, at its Royal Oak Dairy Division, in Hamilton, save and except supervisors/department managers, persons above the rank of supervisor/department manager, sales co-ordinator, interbranch co-ordinator, confidential secretary and outside sales staff" (26 employees in unit) (*Having regard to the agreement of the parties*)

**0286-87-R:** United Plant Guard Workers of America, Local 1958 (Applicant) v. General Motors of Canada Limited (Respondent)

Unit: "all security guards employed by the respondent at its Windsor transmission plant, in Windsor, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week" (15 employees in unit) (*Having regard to the agreement of the parties*)

**0296-87-R:** Energy & Chemical Workers Union (Applicant) v. MIS (Canada) Holdings Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Windsor, Ontario, save and except supervisors and those above the rank of supervisor" (21 employees in unit)

**0309-87-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Cornwall Roof Truss Ltd. (Respondent)

Unit: "all employees of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except foremen, and persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

**0321-87-R:** United Food & Commercial Workers Union, Local 114P (Applicant) v. Canadiana Beef Inc. (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

**0329-87-R:** Ontario Public Service Employees Union (Applicant) v. Laurentian Hospital (Respondent)

Unit: "all medical technologists and technicians employed by the respondent in Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except charge technologists, persons above the rank of charge technologists, office and clerical staff, and those employees in the bargaining units for which any trade union held bargaining rights as of April 30th, 1987" (10 employees in unit) (*Having regard to the agreement of the parties*)

**0347-87-R:** Employees' Association of Naylor Group Inc. (Applicant) v. Naylor Group Incorporated (Respondent)

Unit: "all employees of the respondent in the Regional Municipalities of Halton and Peel save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (50 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0374-87-R:** Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all employees of the respondent working at and out of transfer stations in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

**0383-87-R:** Ontario Public Service Employees Union (Applicant) v. St. Joseph's General Hospital (Respondent)

Unit: "all lay medical technologists, technicians, laboratory assistants, x-ray technologists and dark room technicians employed by St. Joseph's General Hospital in Peterborough, Ontario, in its Medical Laboratory and Department of Radiology, who are regularly employed for not more than 24 hours per week, students, students employed during the school vacation periods, save and except the Supervisor of the Laboratory, Supervisor of the X-Ray Department and office and clerical staff, and employees covered by subsisting collective agreements" (12 employees in unit) (*Having regard to the agreement of the parties*)

**0398-87-R:** International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Kemp Electric Ltd. (Respondent)

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0401-87-R:** International Brotherhood of Electrical Workers (Applicant) v. Richmond Hill Hydro-Electric Commission (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent in the Town of Richmond Hill save and except supervisors, persons above the rank of supervisor, secretaries, professional engineers, system control operator, cost accountant, assistant line supervisor, sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period or on a co-operative training basis with a school, college or university, and employees in bargaining units for whom any trade union held bargaining rights as of May 11, 1987" (19 employees in unit) (*Having regard to the agreement of the parties*)

**0418-87-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Presteve Foods Limited (Respondent)

Unit: "all employees of the respondent at its plant at Wheatley, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of May 13, 1987" (31 employees in unit) (*Having regard to the agreement of the parties*)

**0422-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Traders Metal Company Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

**0437-87-R:** Labourers' International Union of North America, Local 607 (Applicant) v. Spie Construction Inc. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

**0438-87-R:** The International Union of Operating Engineers, Local 793 (Applicant) v. Laidlaw Waste Systems Limited (Respondent)

Unit: "all employees of the respondent in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, office and sales staff" (11 employees in unit) (*Having regard to the agreement of the party*)

**0485-87-R:** Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. CMD Forming Company (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

**0502-87-R:** Graphic Communications International Union, Local 500M (Applicant) v. The Type Connection Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except non-working foreman, office, clerical and sales staff, and persons regularly employed for not more than 24 hours per week" (2 employees in unit) (*Having regard to the agreement of the parties*)

**0504-87-R:** United Steelworkers of America (Applicant) v. LP System (Sudbury) Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Sudbury, save and except managers, persons above the rank of manager, office and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0506-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Scarborough (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the City of Scarborough, save and except employees in the bargaining units for which any trade union held bargaining rights on May 20, 1987" (258 employees in unit) (*Having regard to the agreement of the parties*)

**0507-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Timmins Board of Education (Respondent)

Unit: "all occasional teachers of the respondent in its secondary panel in the City of Timmins, save and except employees in bargaining units for which any trade union held bargaining rights as of May 20, 1987" (34 employees in unit) (*Having regard to the agreement of the parties*)

**0510-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Amico Contracting & Engineering Inc. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all employees of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0511-87-R:** United Brotherhood of Carpenters' & Joiners of America, Local 27 (Applicant) v. Tara Contracting Inc. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry, except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

**0524-87-R:** International Union of Painters & Allied Trades, Local 1891 (Applicant) v. Custom Drywall (Respondent)

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Clarity Note*)

Unit #2: "all painters and painters' apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees) (*Clarity Note*)

**0544-87-R:** Canadian Paperworkers Union (Applicant) v. T.R.S. Food Service Ltd. (Respondent)

Unit #1: "all employees of the respondent in Cornwall save and except supervisors, persons above the rank of supervisor, chef, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (31 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in Cornwall regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, chef, office and clerical staff" (8 employees in unit) (*Clarity Note*)

**0571-87-R:** Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Kilean Lodge Incorporated (Respondent)

Unit: "all employees of the respondent in the Town of Grimsby, in the County of Lincoln, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, dietitians, supervisors, persons above the rank of supervisor and office staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

**0574-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Hi-Road Earthmoving Inc. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0575-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Hi-Road Earthmoving Inc. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton with the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

**0576-87-R:** Labourers' International Union of North America, Local 1036 (Applicant) v. CAV-ERK Amusements Inc. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sector in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**0594-87-R:** Ontario Secondary School Teachers' Association (Applicant) v. Kirkland Lake Board of Education (Respondent)

Unit: "all occasional teachers of the respondent in Kirkland Lake in its secondary panel" (24 employees in unit)

**0600-87-R:** Labourers' International Union of North America, Local 1036 (Applicant) v. Ornamental Precast Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0614-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. V. K. Mason Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0643-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Valee-Way General Contractors Inc. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, com-

mercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

### Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

**2472-86-R:** Canadian Union of Public Employees (Applicant) v. Hornepayne Community Hospital (Respondent)

Unit #1: "all office and clerical employees of the respondent in the Township of Hornepayne, save and except supervisors, persons above the rank of supervisor, secretary to the Chief Executive Officer, persons regularly employed for not more than 24 hours per week and employees in bargaining units for which any trade union held bargaining rights as of December 3, 1986" (3 employees in unit)

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		0

Unit #2: "all office and clerical employees of the respondent regularly employed for not more than 24 hours per week in the Township of Hornepayne, save and except supervisors, persons above the rank of supervisor, secretary to the Chief Executive Officer and employees in bargaining units for which any trade union held bargaining rights as of December 3, 1986" (2 employees in unit)

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	1	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		0

Unit #3: "all employees of the respondent in the Township of Hornepayne, save and except supervisors, persons above the rank of supervisor, professional medical staff, office and clerical staff, paramedical employees, persons regularly employed for not more than 24 hours per week and employees in bargaining units for which any trade union held bargaining rights as of December 3, 1986" (11 employees in unit)

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		4
Ballots segregated and not counted		1

Unit #4: "all employees of the respondent regularly employed for not more than 24 hours per week in the Township of Hornepayne save and except supervisors, persons above the rank of supervisor, professional medical staff, office and clerical staff, paramedical employees and employees in bargaining units for which any trade union held bargaining rights as of December 3, 1986" (21 employees in unit)

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		5

**2807-86-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Marmon Holdings of Canada Inc., c.o.b. under registered name & style of McRobert

Spring Company, and The Marmon Group of Canada Inc., c.o.b. under registered name & style of Inter-City Distribution (Respondents)

Unit: "all employees of the respondents in Cambridge, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period" (42 employees in unit)

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	41	
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		20

**0122-87-R:** Ontario Public School Teachers' Federation (Applicant) v. Lincoln County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the County of Lincoln, save and except employees in bargaining units for which any trade union held bargaining rights as of April 13, 1987" (288 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		288
Number of persons who cast ballots	102	
Number of ballots marked in favour of applicant		89
Number of ballots marked against applicant		13

**0127-87-R:** United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CIO:CLC (Applicant) v. William H. Kaufman Inc. (Respondent)

Unit: "all employees of the respondent at its Kaufman Footwear Division in the Regional Municipality of Waterloo, save and except supervisors, persons above the rank of supervisor, office and sales staff" (1015 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		1015
Number of persons who cast ballots	1025	
Number of spoiled ballots		15
Number of ballots marked in favour of applicant		537
Number of ballots marked against applicant		467
Ballots segregated and not counted		6

**0192-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. W. R. Grace & Co. Canada Ltd. (Respondent) v. The Canadian Union of Operating Engineers (Intervener)

Unit: "all employees of the respondent at its Cryovac Division in Mississauga, save and except stationary engineers, foremen, persons above the rank of foreman, engineers, research and development, and quality control personnel, office and sales staff" (160 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		160
Number of persons who cast ballots	143	
Number of ballots marked in favour of applicant		132
Number of ballots marked in favour of intervener		11

**0318-87-R:** Canadian Textile & Chemical Union (Applicant) v. Peel County Restaurant Inc. (Respondent) v. Hotel Employees & Restaurant Employees Union, Local 75 (Intervener)

Unit: "all employees of the respondent at Rexdale, Ontario, save and except head chef, maitre'd, supervisors, persons above the rank of supervisor, sales staff, accounting staff and office staff" (76 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		76
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Number of persons who cast ballots	57	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		55
Number of ballots marked in favour of intervener		1

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**1498-86-R:** Canadian Union of Public Employees (Applicant) v. Lapalme Nursing Home Ltd. (Respondent)  
v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in Embrun save and except professional medical staff, registered, graduate and undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, occupational therapists, office and clerical employees, supervisors, persons above the rank of supervisor, persons employed for not more than 24 hours per week, and students employed during the school vacation period" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	31	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	30	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		13
Ballots segregated and not counted		1

Unit #2: "all employees of the Lapalme Nursing Home Ltd. in Embrun employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, occupational therapists, office and clerical employees, supervisors and persons above such rank" (48 employees in unit)

Number of names of persons on revised voters' list		39
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		20
Number of ballots marked against applicant		15

**3131-86-R:** Ontario Public Service Employees Union (Applicant) v. Payukotayno Corporation, c.o.b. as James & Hudson Bay Family Services (Respondent)

Unit: "all employees of the respondent in the Municipality of Moosonee and Moose Factory and the branch offices, save and except supervisors and those above the rank of supervisor" (29 employees in unit)

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		4

**3415-86-R:** Ontario Public Service Employees Union (Applicant) v. Sault Ste. Marie General Hospital (Respondent)

Unit: "all office and clerical employees of the respondent at Sault Ste. Marie regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, administrative secretary, administrative clerk, nursing service secretary, personnel receptionist clerk typist" (26 employees in unit)

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		4

**3491-86-R:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Graham Bowyer Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Ottawa, save and except assistant service manager, office staff and store employees" (24 employees in unit)

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	24	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	23	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		10

**0051-87-R:** International Brotherhood of Electrical Workers, Local 586 (Applicant) v. The Hydro-Electric Commission of the City of Nepean (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all employees of the respondent, save and except those of the rank of working crew foremen, non-working crew foreman, superintendent of operations, office, technical and engineering staff" (39 employees in unit)

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		36
Number of ballots marked in favour of intervener		2

**0052-87-R:** International Brotherhood of Electrical Workers, Local 586 (Applicant) v. The Hydro-Electric Commission of the City of Nepean (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all office and clerical and technician employees of the respondent, save and except those of the rank of supervisor, those above the rank of supervisor, executive secretary, secretary to the assistant general manager/chief engineer and the administrative assistant to the general manager" (22 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		22
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		19
Number of ballots marked in favour of intervener		1

**0090-87-R:** Energy & Chemical Workers Union (Applicant) v. General Abrasive Operation Dresser Canada, Inc. (Respondent) v. Teamsters Local 1420, Chemical Energy & Allied Workers Division (Intervener)

Unit: "all of the persons employed by the respondent at its plant in the City of Niagara Falls, Ontario, save and except spare and assistant foremen, foremen, persons above the rank of foreman, watchman, store-keeper, and office and clerical staff and outside cleaning service in the administrative areas and not over 3 trainees" (70 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		70
Number of persons who cast ballots	61	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		58
Number of ballots marked in favour of intervener		1

**0247-87-R:** Service Employees International Union, Local 204, affiliated with S.E.I.U., AFL:CIO:CLC (Applicant) v. Morrison Residence (Cheshire) Foundation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and stu-

dents employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		4

**0291-87-R:** Canadian Union of Public Employees (Applicant) v. Arbor Living Centres Ltd. (Respondent)

Unit: "all employees of the respondent at its Chateau Park Lodge Retirement Home in Windsor, save and except professional medical staff, registered, graduate and undergraduate nurses, pharmacists, dieticians, office, clerical and technical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		37
Number of persons who cast ballots	38	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	36	
Number of segregated ballots cast by persons whose names do not appear on voters' list	2	
Number of ballots marked in favour of applicant		24
Number of ballots marked against applicant		12

### Applications for Certification Dismissed Without Vote

**1721-85-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Olympia & York Developments Limited, c.o.b. as Olympia Floor & Wall Tile Company (Respondent) v. Group of Employees (Objectors) (106 employees in unit)

**2838-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. 608322 Ontario Inc., Delco Contractors (Respondent)

Unit: "all carpenters and carpenters' apprentices employed by the employer in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in Board Area 1, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (1 employee in unit) (*Having regard to the agreement of the parties*)

**3376-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Divo Construction (Respondent) (2 employees in unit)

**0182-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Neil's Roofing & General Contracting Co. (Respondent) (3 employees in unit)

**0218-87-R:** Ironworkers District Council of Ontario (Applicant) v. Kenoyd Limited, trading as Pickering Welding & Steel Supply (Respondent) v. United Steelworkers of America (Intervener) (3 employees in unit)

**0298-87-R:** Amalgamated Clothing & Textile Workers Union, Toronto Joint Board (Applicant) v. Able Plastics Limited (Respondent) v. Group of Employees (Objectors) (93 employees in unit)

**0324-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Wellington County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Wellington, save and except employees in bargaining units for which any trade union held bargaining rights as of May 1, 1987" (97 employees in unit)

**0439-87-R:** The Association of Allied Health Professionals, Ontario (Applicant) v. The Toronto Hospital, operating as Toronto Western Hospital (Respondent)

Unit: "all technical employees of the Toronto Western Hospital, at 399 Bathurst Street, Toronto, save and except Chief Technician, persons above the rank of Chief Technician, persons regularly employed for not more than 21.75 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements" (261 employees in unit)

**0592-87-R:** The Public Service Alliance of Canada (Applicant) v. Wagnahgun Security Services (Respondent) (8 employees in unit)

**0633-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Oakes Construction (Respondent) (4 employees in unit)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**3343-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Baywood Carpentry Limited (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Number of names of persons on voters' list		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		8
Number of spoiled ballots		1

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Number of names of persons on voters' list		10
Number of persons who cast ballots	10	
Number of ballots in favour of applicant		0
Number of ballots marked in favour of intervener		10

**0098-87-R:** Canadian Paperworkers Union (Applicant) v. Belkin Packaging Ltd. (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener)

Unit: "all stationary engineers and persons primarily engaged as their helpers employed by the respondent in the Municipality of Metropolitan Toronto, save and except the Chief Power Engineer and persons above the rank of Chief Power Engineer" (9 employees in unit)

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		8
Number of ballots marked in favour of intervener		1

**0117-87-R:** Great Lakes Fishermen & Allied Workers' Union (Applicant) v. Kingsville Fishermen's Company Ltd. (Respondent)

Unit: "all employees of the respondent in Kingsville, Ontario, save and except foremen, persons above the rank of foreman, fishermen, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (57 employees in unit)

Number of names of persons on revised voters' list		57
Number of persons who cast ballots	56	
Number of ballots marked in favour of applicant		20
Number of ballots marked against applicant		35
Ballots segregated and not counted		1

**0299-87-R:** Canadian Paperworkers Union (Applicant) v. Fraser Inc. (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener)

Unit: "all stationary engineers, engineer firemen and steam plant helpers, save and except the chief engineer" (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		0
Number of ballots marked in favour of intervener		12

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**3152-86-R:** United Food & Commercial Workers' International Union, Local 175 (Applicant) v. Peter Piper Inn Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all office, clerical and front desk employees of the respondent in the City of Sudbury, save and except Assistant General Manager, and persons above the rank of Assistant General Manager" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		8
Ballots segregated and not counted		1

Unit #2: (see *Bargaining Agents Certified Without Vote*)

**0300-87-R:** Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. York County Hospital Corporation (Respondent)

Unit: "all office and clerical employees of the respondent in Newmarket regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, Secretary Assistant to the Personnel Director, Executive Assistant to the Executive Director, Methods Analyst, Medical Records Librarians, Payroll Officers, Secretaries to the Assistant Executive Directors, Director of Nursing, Comptroller and persons for whom any trade union held bargaining rights as of April 30, 1987" (68 employees in unit)

Number of names of persons on list as originally prepared by employer		68
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		15

### Applications for Certification Withdrawn

**2612-86-R:** Lakehead University Faculty Association, Unit #3 (Applicant) v. Board of Governors of Lakehead University (Respondent)

**3295-86-R:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Speed & Precision Construction Ltd. (Respondent)

**0435-87-R:** United Steelworkers of America (Applicant) v. Aluminart Products Ltd. (Respondent)

**0443-87-R:** Graphic Communications International Union, Local 500M (Applicant) v. W.L. Smith & Associates Ltd. (Respondent)

**0450-87-R:** Labourers' International Union of North America, Local 1036 (Applicant) v. Towland Hewitson Construction Limited (Respondent)

**0466-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Wentworth County Board of Education (Respondent)

**0468-87-R:** Hotel & Restaurant Employees Union, Local 75 (Applicant) v. Westfort Hotel (Respondent)

**0481-87-R:** Ironworkers District Council of Ontario (Applicant) v. Tek-Mor Incorporated (Respondent)

**0512-87-R:** Teamsters Local 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Bono General Construction Limited (Respondent) v. Group of Employees (Objectors)

**0597-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Seal-On Paving Ltd. (Respondent)

**0598-87-R:** Labourers' International Union of North America, Local 625 (Applicant) v. Seal-On Paving Ltd. (Respondent)

**0599-87-R:** Labourers' International Union of North America, Local 1036 (Applicant) v. Ornamental Precast Ltd. (Respondent)

**0648-87-R:** Energy & Chemical Workers Union (Applicant) v. Serviplast (Respondent)

**0688-87-R:** International Union of Operating Engineers, Local 796 (Applicant) v. Royal Ontario Museum (Respondent) v. Royal Ontario Museum Curatorial Association (Intervener #1) v. Service Employees International Union, Local 204 (Intervener #2) v. Ontario Public Service Employees Union, Local 543 (Intervener #3)

**0707-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Board of Education for the City of York (Respondent)

**0728-87-R:** Ironworkers District Council of Ontario (Applicant) v. 594623 Ontario Inc. (Respondent)

**0738-87-R:** Labourers' International Union of North America, Ontario Provincial Council (Applicant) v. Underground Services (1983) Ltd. (Respondent)

**0744-87-R:** International Brotherhood of Electrical Workers (Parks Board Employees) (Applicant) v. The Corporation of the Town of Dryden (Respondent)

## **APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER**

**2213-86-R:** Ontario Provincial Conference of The International Union of Bricklayers & Allied Craftsmen (Applicant) v. Perseas Thoma Masonry Ltd. (Respondent) (*Dismissed*)

**2298-86-R:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Raymond Brisson, c.o.b. as Eighty-Five Electric, and Richard Tominski, c.o.b. as R. T. Electric (Respondents) (*Dismissed*)

**2911-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Unique Flooring & Installations (Windsor) Ltd., Burling & Crawford Flooring, and 661808 Ontario Inc. (Respondents) (*Withdrawn*)

**3140-86-R:** International Union of Operating Engineers, Local 793, and Labourers' International Union of North America, Local 1989 (Applicants) v. D'Amore Construction (Windsor) Limited, Precision Builders (Windsor) Limited, and 617963 Ontario Inc. (Respondents) (*Granted*)

**3309-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bradsil Limited, and Peran Contracting Inc. (Respondents) (*Granted*)

**3400-86-R:** International Brotherhood of Painters & Allied Trades, Local 1795 and 1819 (Applicant) v. Walpat Glass & Aluminum Products Ltd., and M & I Aluminum Ltd. (Respondents) (*Granted*)

**3448-86-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Marmon Holdings of Canada Inc., c.o.b. under the registered name & style of McRobert Spring Company, and The Marmon Group of Canada Inc., c.o.b. under the registered name and style of Inter-City Distribution (Respondents) (*Granted*)

**0178-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 593 (Applicant) v. Eric Greenbeck Limited, and Greenbeck Plumbing & Heating (Respondents) (*Withdrawn*)

**0282-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 1030 (Applicant) v. Nepean Roof Truss Limited, C.J.H. Holdings & Ottawa Forest Products (1983) Ltd. (Respondents) (*Dismissed*)

**0496-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Mopal Construction Limited, and Loc-Pave Construction Limited (Respondents) (*Withdrawn*)

## SALE OF A BUSINESS

**1227-86-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Stimson Contracting Limited, and Berken Construction Inc. (Respondents) (*Granted*)

**2298-86-R:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Raymond Brisson, c.o.b. as Eighty-Five Electric, and Richard Tominski, c.o.b. as R. T. Electric (Respondents) (*Dismissed*)

**2871-86-R:** International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Applicant) v. John Katsuras, c.o.b. as Krush (Respondent) (*Granted*)

**2910-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Unique Flooring & Installations (Windsor) Ltd., Burlington & Crawford Flooring, and 661808 Ontario Inc. (Respondents) (*Withdrawn*)

**3217-86-R:** United Steelworkers of America (Applicant) v. IMSE Inc. (Respondent) (*Granted*)

**3260-86-R:** International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Feer Insulation Ltd., and Tri-Star Insulation Limited (Respondents) (*Withdrawn*)

**3309-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bradsil Limited, and Peran Contracting Inc. (Respondents) (*Granted*)

**3401-86-R:** International Brotherhood of Painters & Allied Trades, Locals 1795 & 1819 (Applicant) v. Walpat Glass & Aluminum Products Ltd., and M & I Aluminum Ltd. (Respondents) (*Dismissed*)

**0164-87-R:** Toronto Motion Picture Projectionists' Union, Local 173 of the International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada (Applicant) v. Far East Theatres Co. Ltd., King Wah Entertainment Ltd., and Yip Ching Lok & Sau Chu Mak, c.o.b. as Sun Wah Cinema (Respondents) (*Withdrawn*)

**0179-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 593 (Applicant) v. Greenbeck Plumbing & Heating (Respondent) (*Withdrawn*)

**0496-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Mopal Construction Limited, and Loc-Pave Construction Limited (Respondents) (*Withdrawn*)

## UNION SUCCESSOR RIGHTS

**3498-86-R:** Amalgamated Transit Union, Local 1608 (Applicant) v. The Corporation of the City of Cambridge (Respondent) (*Granted*)

**0261-87-R:** Service Employees Union, Local 183 (Applicant) v. Carewell Campbellford Nursing Home (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0347-86-R:** Richard Grandy (Applicant) v. The Ontario Pipe Trades Council of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Respondent) v. City Plumbing (Kitchener) Limited (Intervener)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices and welders in the employ of the intervener in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1

**0591-86-R:** Eugene Marks (Applicant) v. United Food & Commercial Workers International Union, Local 617 (Respondent) (*Dismissed*)

**2229-86-R:** Richard Dykes (Applicant) v. Toronto Typographical Union, Local 91 (I.T.U.) (Respondent) v. Ontario Banknote Ltd. (Intervener)

Unit: "all employees of the intervener, Ontario Banknote Ltd., at its plants in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (89 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list		89
Number of persons who cast ballots	79	
Number of ballots marked in favour of respondent		58
Number of ballots marked against respondent		21

**2264-86-R:** Dennis Lazaro, Lourdes Lazaro & Benito Ferreira (Applicants) v. Labourers' International Union of North America, Local 183 (Respondent)

Unit: "all employees of York Condominium Corporation #165 at 10 Edgecliff Golfway in Metropolitan

Toronto engaged in cleaning and maintenance, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (4 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		3
Number of ballots marked against applicant		1

**2639-86-R:** Maisie Maynard (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. 470187 Ontario Limited (Kennedy Apartments) (Intervener) (*Dismissed*)

**2892-86-R:** Norris Transport Limited (Applicant) v. Teamsters Local 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent)

Unit: "all employees of the respondent save and except foremen, persons above the rank of foreman, office staff, sales staff, security guards, and office janitors" (4 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		4

**3165-86-R:** Leo Van Es (Applicant) v. Bakery Confectionary & Tobacco Workers' International Union, Local 264 (Respondent) v. Jane Parker Bakery, Limited (Intervener) (*Withdrawn*)

**3181-86-R:** Samuel (David) Wilson, and Lyse Lebrun (Applicant) v. London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Respondent) v. Pioneer Youth Services Ltd. (Intervener)

Unit: "all employees of the respondent in Kitchener, Waterloo and Guelph, save and except house managers, persons above the rank of house manager, program coordinator, office and clerical staff" (41 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		41
Number of persons who cast ballots	29	
Number of ballots marked in favour of respondent		10
Number of ballots marked against respondent		19

**3252-86-R:** Juan Carlos Ramo and George Sarris (Applicants) v. Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent)

Unit: "all employees of Marlo Precision Machining Limited in its Eastern Precision Machining Division, in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		8

**3387-86-R:** Employees of L & J Plumbing & Heating Ltd. (Applicant) v. Construction Workers, Local 150 (CLAC) (Respondent)

Unit: "all employees of the L & J Plumbing & Heating Ltd. in the Province of Ontario, save and except non-working foremen, those above the rank of non-working foreman, and students employed during the summer school vacation period" (5 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	

Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

**0176-87-R:** Jorge Silva (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) v. Co-Fo Concrete Forming Construction Limited (Intervener) (*Dismissed*)

**0271-87-R:** Employees of Double M & M Janitorial Services at the Ontario Police College (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

**0335-87-R:** Keith Cecchetto (Applicant) v. United Steelworkers of America (Respondent) v. Blackwood Hodge Equipment Limited (Intervener) (*Withdrawn*)

**0452-87-R:** Patricia Foucoalt (Applicant) v. United Food & Commercial Workers, Local 1977 (Respondent) (*Withdrawn*)

**0491-87-R:** Ron Lawson (Applicant) v. Brotherhood of Locomotive Engineers, Local 295 (Respondent) (*Dismissed*)

**0560-87-R:** Joanne Lemieux (Applicant) v. Retail, Wholesale & Department Store Union, Local 429, AFL: CIO:CLC (Respondent) (18 employees in unit) (*Granted*)

**0563-87-R:** Sheik Bacchus (Applicant) v. American Federation of Grain Miller, Local 230 (AFL:CIO:CLC) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**0851-87-U:** Waltec Bathware, division of Waltec Inc. (Applicant) v. Glass, Pottery, Plastics & Allied Workers International Union, Local 367, AFL:CIO:CLC (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

**0699-87-U:** Labourers' International Union of North America, Local 506 (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, Chris Thurrott, and Niagara Mechanical Contractors Limited (Respondents) (*Dismissed*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1537-86-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Lake Erie Foods Inc. (Respondent) (*Withdrawn*)

**1876-86-U:** Professor Saul Schwartz (Complainant) v. The Association of Professors of the University of Ottawa (A.P.U.O.) (Respondent) v. The University of Ottawa (Intervener) (*Withdrawn*)

**1996-86-U:** United Steelworkers of America (Complainant) v. Waltec Inc., Waltec Components Division (Respondent) (*Withdrawn*)

**2475-86-U:** Elfino Spadafora (Complainant) v. National Grocers (Respondent) (*Withdrawn*)

**2705-86-U:** United Food & Commercial Workers Union, Local 175 (Complainant) v. Skaf's Foods (Respondent) (*Withdrawn*)

**2870-86-U:** A.T.U., Local 1573 (Complainant) v. The Corporation of the City of Brampton (Brampton Transit) (Respondent) (*Withdrawn*)

**2992-86-U:** Christian Labour Association of Canada (Complainant) v. Geri-Care Nursing Home of Caressant Care Limited (Respondent) (*Withdrawn*)

**3013-86-U:** John VanSlingerland (Complainant) v. U.S.W.A., Local 2251 (Respondent) v. The Algoma Steel Corporation, Limited (Intervener) (*Withdrawn*)

**3051-86-U:** United Steelworkers of America (Complainant) v. Canadian Uniform Limited (Respondent) (*Withdrawn*)

**3220-86-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Can-Eng Metal Treating Ltd. (Respondent) (*Withdrawn*)

**3243-86-U:** Christian Labour Association of Canada (Complainant) v. Geri-Care Nursing Home of Caressant Care Limited (Respondent) (*Withdrawn*)

**3244-86-U:** Salvatore Di Cesare (Complainant) v. Retail, Wholesale & Department Store Union, Local 414 (Respondent) v. Dom Group (Intervener) (*Dismissed*)

**3522-86-U:** United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. General Coach, division of Citair Inc. (Respondent) (*Withdrawn*)

**0011-87-U:** Wendy Clouston, formerly known as Wendy Houston (Complainant) v. Canadian Union of Public Employees, Local 1880 (March of Dimes Group) (Respondent) (*Withdrawn*)

**0126-87-U:** International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. Jay Jay's Inn (Respondent) (*Withdrawn*)

**0174-87-U:** International Ladies' Garment Workers' Union (Complainant) v. Sheldon M. Kasman Limited (Respondent) (*Withdrawn*)

**0216-87-U:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Complainant) v. Micon Metals Incorporated (Respondent) (*Withdrawn*)

**0217-87-U:** Utility Workers of Canada, Local 1 (Complainant) v. The Public Utilities Commission of The City of Scarborough (Respondent) (*Withdrawn*)

**0239-87-U:** Ontario Public Service Employees Union, Local 530 (Complainant) v. The Toronto Bail Program (Respondent) (*Withdrawn*)

**0243-87-U:** A.E. Long & Company Limited (Complainant) v. Energy & Chemical Workers Union, Local 620 (Respondent) (*Withdrawn*)

**0294-87-U; 0295-87-U:** United Food & Commercial Workers, Local 326 (formerly The Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local 326) (Complainant) v. Uniflex Packaging of Canada Limited (Respondent) (*Withdrawn*)

**0297-87-U:** Chris G. Bancroft (Complainant) v. Local 1826, ACTWU, Brad Field (President), and Roy Austin (Vice-President) (Respondents) (*Withdrawn*)

**0332-87-U; 0333-87-U:** Canadian Union of Public Employees (Complainant) v. Chateau Park Lodge (Respondent) (*Withdrawn*)

**0344-87-U:** United Steelworkers of America (Complainant) v. Stackpole Limited (Respondent) (*Withdrawn*)

**0367-87-U:** International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. Sherway Inn Inc., Peter Elsen, and John Van Elsen (Respondents) (*Withdrawn*)

**0368-87-U:** Helen Huk, Judith Mackie, and Lakehead University Faculty Association, Unit #3 (Complainants) v. Board of Governors of Lakehead University (Respondent) (*Withdrawn*)

**0390-87-U:** Canadian Union of Public Employees, Local 942, and Ron Potapchuk (Complainants) v. Royal Ottawa Hospital (Respondent) (*Withdrawn*)

**0413-87-U:** Kadoke Display Limited (Complainant) v. Labourer's International Union of North America, Local 506 (Respondent) (*Withdrawn*)

**0414-87-U:** Joe Dickson (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

**0425-87-U:** Canadian Union of Public Employees (Complainant) v. Chateau Park Lodge (Respondent) (*Withdrawn*)

**0429-87-U:** United Food & Commercial Workers International Union (Complainant) v. Kitchener Beverages Limited (Respondent) (*Withdrawn*)

**0454-87-U:** Canadian Union of Public Employees, Local 1287 (Complainant) v. Grimsby Hydro-Electric Commission (Respondent) (*Withdrawn*)

**0474-87-U:** Bob McCourt (Complainant) v. Energy & Chemical Workers Union, Local 672 (Respondent) (*Withdrawn*)

**0488-87-U:** Stanley R. Egerton (Complainant) v. Glen Gofrey, President, C.U.P.E. Local 129 (Respondent) (*Withdrawn*)

**0530-87-U:** Pio Huber, et al. (Complainant) v. C.P.U., Local 90 (Respondent) (*Withdrawn*)

**0548-87-U:** Frank McPherson (Complainant) v. Labourers' International Union, Local 506 (Respondent) (*Withdrawn*)

**0561-87-U:** United Food & Commercial Workers International Union, Local 459 (Complainant) v. Mirabai Art Glass Ltd., c.o.b. as Xena Designs (Respondent) (*Withdrawn*)

**0570-87-U:** Nanci Lye (Complainant) v. Ontario Liquor Boards Employees Union (Respondent) (*Withdrawn*)

**0572-87-U:** Service Employees' International Union, Local 204 (Complainant) v. Green Gables Manor Incorporated (Respondent) (*Withdrawn*)

**0584-87-U:** Jairam Khemraj (Complainant) v. Precision Rubber Products (Canada) Ltd., and United Rubber, Cork, Linoleum & Plastic Workers of America (Respondent) (*Withdrawn*)

**0608-87-U:** Bridge Barth, on behalf of employees of Canadian Uniform Ltd., Vankleek Hill, Ontario (Complainant) v. United Steelworkers of America, and Carl Gareau (Respondents) (*Withdrawn*)

**0615-87-U:** J. S. Walker (Complainant) v. O.L.B.E.U. (Respondent) (*Dismissed*)

**0639-87-U:** Pauline Turner (Complainant) v. New Heights Manufacturing Ltd. (Respondent) (*Dismissed*)

**0656-87-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Ontario Engineered Suspensions (Blenheim) Ltd. (Respondent) (*Withdrawn*)

**0695-87-U:** Energy & Chemical Workers Union (Complainant) v. Serviplast Inc. (Respondent) (*Withdrawn*)

**0721-87-U:** Gerald Mercer (Complainant) v. Dufferin Ready-Mix Ltd. (Respondent) (*Dismissed*)

**0740-87-U:** Canadian Union of Public Employees (Complainant) v. Arbor Living Centres (Chateau Park Lodge) (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**3295-84-M:** Canadian Union of Public Employees, CLC, Ontario Hydro Employees Union, Local 1000 (Applicant) v. Ontario Hydro (Line Work, Tweed Area Office) (Respondent) v. McBeath Brothers Contracting (Intervener) (*Dismissed*)

**1848-86-M:** Ottawa Civic Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

**2660-86-M:** Canadian Union of Public Employees (Applicant) v. The Town of Whitby (Respondent) (*Granted*)

**3540-86-M:** The Corporation of the Township of Fort Frances (Applicant) v. CUPE, Local 65 (Respondent) (*Withdrawn*)

**0326-87-M:** United Food & Commercial Workers, Local 459 (Applicant) v. Mirabai Art Glass, c.o.b. as Xena Designs (Respondent) (*Withdrawn*)

## **COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT**

**1861-86-OH-AEC:** United Steelworkers of America (Jacques Gagne, et al. - Compressor Room Employees, Special Grievors) (Complainants) v. Denison Mines Limited (Respondent) (*Withdrawn*)

**2378-86-OH:** Peter R. Terranova (Complainant) v. Quantex Chemical Inc. (Respondent) (*Withdrawn*)

**3377-86-OH:** Dan Culhane (Complainant) v. John Rawlings, and Ford of Canada, St. Thomas Assembly Plant (Respondents) (*Withdrawn*)

**3378-86-OH:** Len Stewart, et al. (Complainants) v. Terry Tingle, Harold Williams, and Border Steel Limited (Windsor) (Respondents) (*Withdrawn*)

**0583-87-OH:** Nancy Swiderski (Complainant) v. Crestway Sales (Respondent) (*Withdrawn*)

**0711-87-OH:** Elaine Taylor (Complainant) v. Nancy Maguda (Victorian Order of Nurses) (Respondent) (*Withdrawn*)

## **COMPLAINTS UNDER THE ATOMIC ENERGY CONTROL ACT**

**1861-86-OH-AEC:** United Steelworkers of America (Jacques Gagne, et al. - Compressor Room Employees, Special Grievors) (Complainants) v. Denison Mines Limited (Respondent) (*Withdrawn*)

## **CONSTRUCTION INDUSTRY GRIEVANCES**

**0548-86-M:** International Union of Operating Engineers, Local 793 (Applicant) v. C. & M. McNally Engineering Inc. (Respondent) (*Withdrawn*)

**0575-86-M; 0555-87-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Limited (Respondent) (*Granted*)

**1226-86-M:** Labourers' International Union of North America, Local 1059 (Applicant) v. Berken Construction Inc., and Stimson Contracting Limited (Respondents) (*Granted*)

**2430-86-M:** Ontario Sheet Metal Workers' Conference (Applicant) v. H.H. Robertson Inc. (Respondent) (*Granted*)

**2673-86-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Nadrofsky Corporation (Respondent) (*Withdrawn*)

**3323-86-M:** The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 7 (Canada) (Applicant) v. George & Asmussen Limited (Respondent) (*Withdrawn*)

**3330-86-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Nadrofsky Corporation (Respondent) (*Granted*)

**3445-86-M:** Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local 598 (Applicant) v. The McBride Group, and 21st Century Building Restoration (Cabot Trust), and 556029 Ontario Limited (Respondents) (*Withdrawn*)

**3539-86-M:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Perseas Thoma Masonry Ltd., and Tony Thoma, c.o.b. as Cyprus Masonry (Respondents) (*Dismissed*)

**0879-86-M:** The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Comstock International Ltd. (Respondent) (*Granted*)

**0177-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 593 (Applicant) v. Eric Greenbeck Limited, c.o.b. as Greenbeck Plumbing & Heating (Respondents) (*Withdrawn*)

**0215-87-G:** International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. Consolidated Aluminium & Glass Corp., and Consolidated Aluminium (Maritimes) Ltd. (Respondents) (*Granted*)

**0307-87-G:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Springhurst Mechanical & Electrical Limited (Respondent) (*Granted*)

**0331-87-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Brikon Masonry Inc. (Respondent) (*Granted*)

**0341-87-G:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Catalyst Technology (Canada) Ltd. (Respondent) (*Granted*)

**0405-87-G:** Operative Plasterers' & Cement Masons' International Association of U.S. & Canada, Local 598 (Applicant) v. Ellis Don Limited (Respondent) (*Withdrawn*)

**0411-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Collavino Inc. (Respondent) (*Granted*)

**0415-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bradsil Limited (Respondent) (*Granted*)

**0416-87-G; 0417-86-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Internorth Construction Company Limited (Respondent) (*Granted*)

**0464-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. PCL Industrial Constructors Inc. (Respondent) (*Withdrawn*)

**0476-87-G:** Operative Plasterers' & Cement Masons' International Association, Local 172 (Applicant) v. Clifford Masonry Limited (Respondent) (*Withdrawn*)

**0516-87-G:** International Brotherhood of Electrical Workers, Local 353, I.B.E.W., CCO (Applicant) v. J. Murphy Electric Ltd. (Respondent) (*Granted*)

**0526-87-G:** International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. Consolidated Aluminium & Glass Corp., and Consolidated Aluminium (Maritimes) Ltd. (Respondents) (*Granted*)

**0565-87-G:** International Brotherhood of Painters & Allied Trades, District Council #46 (Applicant) v. Spanos Painting Ltd. (Respondent) (*Granted*)

**0581-87-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Ken Scharf Construction (Respondent) (*Granted*)

**0587-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. G.L. Trenching Ltd. (Respondent) (*Withdrawn*)

**0605-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Tony Di Monte Drainage Contractors Limited (Respondent) (*Withdrawn*)

**0641-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 1256 (Applicant) v. Ray Bigras Drywall & Acoustic Ltd. (Respondent) (*Granted*)

**0653-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Dominion Paving Ltd. (Respondent) (*Withdrawn*)

**0654-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Patella Construction Inc. (Respondent) (*Withdrawn*)

**0669-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Natale Bros. Paving Co. Ltd. (Respondent) (*Withdrawn*)

**0671-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Luciani Brothers Construction Ltd. (Respondent) (*Withdrawn*)

**0672-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Batoni Construction Inc. (Respondent) (*Withdrawn*)

**0680-87-G:** Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Brunswick Drywall (Ontario) Limited (Respondent) (*Withdrawn*)

**0697-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. All Star Carpentry Ltd. (Respondent) (*Withdrawn*)

**0716-87-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Pe Ben Pipelines (1979) Ltd. (Respondent) (*Granted*)

**0718-87-G:** International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Kerdea Masonry Ltd. (Respondent) (*Withdrawn*)

**0734-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Teskey Construction Co. Limited (Respondent) (*Withdrawn*)

**0760-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Niran Construction Ltd. (Respondent) (*Withdrawn*)

**0761-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. M.D.R. (619138) Ontario Inc. (Respondent) (*Withdrawn*)

**0762-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. M. M. Construction Company Limited (Respondent) (*Withdrawn*)

**0763-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Lucy Construction Ltd. (Respondent) (*Withdrawn*)

**0787-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. G.W. Barr Construction & Engineering Ltd. (Respondent) (*Withdrawn*)

**0808-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Ferma Concrete & Paving Limited (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**1429-84-R:** Interior Systems Contractors Association of Ontario (Applicant) v. International Brotherhood of Painters & Allied Trades, and Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1891 (Respondents) v. Acoustical Association of Ontario (Intervener #1) v. Residential Painting Contractors of Ontario (Intervener #2) (*Dismissed*)

**0356-86-R:** J. Marie Walton (Applicant) v. Ontario Nurses' Association (Respondent) v. Brantwood Manor Nursing Home (Intervener) (*Dismissed*)

**0390-86-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Village of Stirling (Respondent) (*Withdrawn*)

**2136-86-JD:** Ontario Pipe Trades Council of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Complainants) v. COSMA, division of Magna International Inc., Millwrights Unlimited, Association of Millwrighting Contractors of Ontario Inc., United Brotherhood of Carpenters & Joiners of America, Millwrights Local 1916, and Mechanical Contractors Association of Ontario (Respondents) (*Dismissed*)

**2755-86-M:** Ontario Allied Construction Trades Counsel, and Labourers' International Union of North America, Local 1059 (Applicants) v. The Electric Power System Construction Association, Ontario Hydro, and John's Mansville Canada Ltd. (Respondents) (*Dismissed*)

**3442-86-R:** Ontario Public Service Employees Union (Applicant) v. Grand River Conservation Authority (Respondent) (*Dismissed*)

**0419-87-R:** Ontario Public Service Employees Union (Applicant) v. Queen's University at Kingston (Respondent) v. Canadian Union of Public Employees (Intervener) (*Dismissed*)





*Ontario Labour Relations Board,  
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# ONTARIO LABOUR RELATIONS BOARD REPORTS

August 1987



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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1987] OLRB REP. AUGUST**

**EDITOR: COLLEEN EDWARDS**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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## CASES REPORTED

1.	Babcock and Wilcox Canada Ltd.; Re Quality Control Council of Canada .....	1053
2.	Burlington Air Express (Canada) Ltd.; Re T.T.U. No. 91 .....	1056
3.	Burlington Northern Air Freight (Canada) Ltd.; Re T.T.U., Local 91; Re Rick Best .....	1064
4.	Electrical Power Systems Construction Association, The; Re B.S.O.I.W. ....	1079
5.	Jacmorr Manufacturing Limited; Re U.F.C.W. ....	1086
6.	Ottawa Citizen, The, A Division of Southam Inc.; Re Ontario Newspaper Guild, Local 205	1098
7.	Richard D. Steele Construction (1979) Ltd.; Re C.J.A., Local 1030 .....	1110
8.	Wellington County Board of Education; Re O.S.S.T.F. ....	1114



## SUBJECT INDEX

- Bargaining Rights - Certification - Construction Industry - Reconsideration - Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent - Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees - Whether Board should revoke or amend prior certificate - Certificate revoked
- RICHARD D. STEELE CONSTRUCTION (1979) LTD.; RE C.J.A., LOCAL 1030 ..... 1110
- Bargaining Unit - Certification - Union seeking bargaining unit comprising the computer information services department of a newspaper - Unit one of the few departments remaining unorganized - Where there has been a history of fragmentation the Board may consider a departmental unit to be appropriate - Sufficient community of interest and no serious labour relations difficulties would result if unit found appropriate - Tag-end unit not yet necessary - Departmental unit found appropriate
- OTTAWA CITIZEN, THE, A DIVISION OF SOUTHAM INC.; RE ONTARIO NEWS-PAPER GUILD, LOCAL 205 ..... 1098
- Certification - Bargaining Rights - Construction Industry - Reconsideration - Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent - Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees - Whether Board should revoke or amend prior certificate - Certificate revoked
- RICHARD D. STEELE CONSTRUCTION (1979) LTD.; RE C.J.A., LOCAL 1030 ..... 1110
- Certification - Bargaining Unit - Union seeking bargaining unit comprising the computer information services department of a newspaper - Unit one of the few departments remaining unorganized - Where there has been a history of fragmentation the Board may consider a departmental unit to be appropriate - Sufficient community of interest and no serious labour relations difficulties would result if unit found appropriate - Tag-end unit not yet necessary - Departmental unit found appropriate
- OTTAWA CITIZEN, THE, A DIVISION OF SOUTHAM INC.; RE ONTARIO NEWS-PAPER GUILD, LOCAL 205 ..... 1098
- Certification - Pre-Hearing Vote - Pre-hearing vote for occasional teachers to be conducted by poll with notice to be given by mail - Respondent ordered to provide mailing labels to Board for all persons on voters' list to facilitate notification - Respondent also ordered to provide applicant with the names and addresses of those on voters' list, either in the form of mailing labels, as requested by the applicant, or in any other convenient form
- WELLINGTON COUNTY BOARD OF EDUCATION; RE O.S.S.T.F. .... 1114
- Construction Industry - Bargaining Rights - Certification - Reconsideration - Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent - Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees - Whether Board should revoke or amend prior certificate - Certificate revoked
- RICHARD D. STEELE CONSTRUCTION (1979) LTD.; RE C.J.A., LOCAL 1030 ..... 1110
- Construction Industry Grievance - Respondent bound by collective agreement in respect of construction industry work - Issue as to whether respondent bound in respect of non-construction industry work

## II

tion work in the field - Board's jurisdiction under s.124 not confined to grievances which pertain exclusively to construction work

BABCOCK AND WILCOX CANADA LTD.; RE QUALITY CONTROL COUNCIL OF CANADA .....

1053

Construction Industry Grievance - Timeliness - Whether applicant employer can recover an alleged improper overpayment, as against an individual employee, through a grievance formally against a trade union but specifying the individual concerned - Application dismissed for delay - Pursuit of redress in another forum not constituting reasonable grounds for delay in filing a complaint with the Board

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE B.S.O.I.W. ....

1079

Damages - Remedies - Unfair Labour Practice - Duty of unfair labour practice complainant to mitigate damages not paralleling that of a former employee in a wrongful dismissal action - Complainant making reasonable efforts to mitigate her losses - Board having jurisdiction to award damages for mental distress but such damages denied here because claim made too late

JACMORR MANUFACTURING LIMITED; RE U.F.C.W. ....

1086

Damages - Unfair Labour Practice - Complaints relisted for hearing for the purpose of determining quantum of damages - Damages for loss of opportunity to negotiate a collective agreement discussed - Interest rate determined for complaints that were filed in different months - Costs denied - Respondent ordered to compensate union for half of its reasonable negotiating expenses - Union entitled to be reimbursed for costs incurred in producing materials regarding the lock-out - Duty of locked out employees to mitigate their damages reviewed - Lock-out pay provided to employees by the international union a compensable loss

BURLINGTON NORTHERN AIR FREIGHT (CANADA) LTD.; RE T.T.U., LOCAL 91; RE RICK BEST .....

1064

Pre-Hearing Vote - Certification - Pre-hearing vote for occasional teachers to be conducted by poll with notice to be given by mail - Respondent ordered to provide mailing labels to Board for all persons on voters' list to facilitate notification - Respondent also ordered to provide applicant with the names and addresses of those on voters' list, either in the form of mailing labels, as requested by the applicant, or in any other convenient form

WELLINGTON COUNTY BOARD OF EDUCATION; RE O.S.S.T.F. ....

1114

Reconsideration - Bargaining Rights - Construction Industry - Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent - Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees - Whether Board should revoke or amend prior certificate - Certificate revoked

RICHARD D. STEELE CONSTRUCTION (1979) LTD.; RE C.J.A., LOCAL 1030 .....

1110

Remedies - Damages - Unfair Labour Practice - Duty of unfair labour practice complainant to mitigate damages not paralleling that of a former employee in a wrongful dismissal action - Complainant making reasonable efforts to mitigate her losses - Board having jurisdiction to award damages for mental distress but such damages denied here because claim made too late

JACMORR MANUFACTURING LIMITED; RE U.F.C.W. ....

1086

Timeliness - Construction Industry Grievance - Whether applicant employer can recover an alleged improper overpayment, as against an individual employee, through a grievance formally against a trade union but specifying the individual concerned - Application dismissed

for delay - Pursuit of redress in another forum not constituting reasonable grounds for delay in filing a complaint with the Board

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE B.S.O.I.W. .... 1079

Unfair Labour Practice - Damages - Complaints relisted for hearing for the purpose of determining quantum of damages - Damages for loss of opportunity to negotiate a collective agreement discussed - Interest rate determined for complaints that were filed in different months - Costs denied - Respondent ordered to compensate union for half of its reasonable negotiating expenses - Union entitled to be reimbursed for costs incurred in producing materials regarding the lock-out - Duty of locked out employees to mitigate their damages reviewed - Lock-out pay provided to employees by the international union a compensable loss

BURLINGTON NORTHERN AIR FREIGHT (CANADA) LTD.; RE T.T.U. NO. 91.... 1064

Unfair Labour Practice - Damages - Remedies - Duty of unfair labour practice complainant to mitigate damages not paralleling that of a former employee in a wrongful dismissal action - Complainant making reasonable efforts to mitigate her losses - Board having jurisdiction to award damages for mental distress but such damages denied here because claim made too late

JACMORR MANUFACTURING LIMITED; RE U.F.C.W. .... 1086

Unfair Labour Practice - In earlier proceeding respondent ordered to compensate employee for reducing his working hours contrary to the Act - Employee later resigning but requesting part-time work - Respondent refusing to re-hire employee on a part-time basis - Evidence insufficient to show total absence of anti-union animus - Respondent ordered to offer a part-time position to the employee

BURLINGTON AIR EXPRESS (CANADA) LTD.; RE T.T.U. NO. 91 ..... 1056



**0315-86-M Quality Control Council of Canada, Applicant v. Babcock and Wilcox Canada Ltd., Respondent**

**Construction Industry Grievance - Respondent bound by collective agreement in respect of construction industry work - Issue as to whether respondent bound in respect of non-construction work in the field - Board's jurisdiction under section 124 not confined to grievances which pertain exclusively to construction work**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

**APPEARANCES:** *Paul Timmins*, *Matt Bakker* and *J. Russ St. Eloi* for the applicant; *H. Beresford*, *D. T. Butt*, *D. M. Sanderson*, *D. McIntyre*, *T. Griffith* and *C. Chenoweth* for the respondent.

**DECISION OF THE BOARD;** August 6, 1987

1. This is a referral of a grievance to the Board under section 124 of the *Labour Relations Act*. The grievance alleges that the respondent has violated Articles 3, 16, and 25 of a collective agreement between the applicant and the Non-Destructive Testing Management Association (the "Association").

2. During his opening statement to the Board on June 23, 1987, counsel for the respondent raised the matter of notice to the Association. After reviewing the file and considering the submissions of the parties concerning that matter, the Board made the following unanimous oral ruling, which is hereby confirmed:

We are satisfied that the Non-Destructive Testing Management Association has been given adequate notice of these proceedings.

3. In a decision dated June 26, 1987, concerning this referral, we wrote, in part, as follows:

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.
2. We have decided to reserve our decision regarding the "preliminary matters" raised by counsel for the respondent on June 23, 1987, and to proceed with the hearing of this referral.

Having now had an opportunity to further consider those "preliminary matters", we have reached the conclusions set forth below.

4. On January 26, 1983, another panel of the Board accredited the Association as the bargaining agent for all employers of non-destructive testing technicians, trainees and helpers for whom the respondent has bargaining rights in the Province of Ontario in the industrial, commercial and institutional sector, the sewers and watermain sector, the roads sector, the heavy engineering sector, the pipeline sector, and the electrical power systems sector in the construction industry. The accreditation certificate (Exhibit 4 in these proceedings) lists "Babcock & Wilcox Canada" as one of the employers for whom the Association became the bargaining agent under that certificate. It is common ground between the parties that, as a result of that accreditation certificate, the December 1, 1984 to November 30, 1986 collective agreement (Exhibit 5) between the applicant and the Association was binding upon the respondent in respect of construction industry work at the time of the grievance. (For ease of exposition, that document is referred to in this decision as

the "Quality Control Agreement".) However, the issue of whether that document also binds the respondent in respect of non-construction work performed in the field is in dispute.

5. The applicant contends that by virtue of an agreement (Exhibit 1 in these proceedings) dated June 13, 1980 between the applicant and the respondent, and a letter of clarification (Exhibit 3) dated July 9, 1980, from J. R. Ashton to J. Russ St. Eloi, the respondent is bound by the terms of the Quality Control Agreement in respect of "New Construction, Repair, Revamp and Maintenance Work performed by the [respondent's] Construction operations in the field". In this regard, applicant's counsel submits that the Quality Control Agreement is either a single collective agreement covering all of that work, or two collective agreements (contained in a single document), one of which pertains to construction work, and the other of which pertains to non-construction work performed in the field.

6. Counsel for the respondent disputes the applicant's position, and contends that the respondent is only bound by the Quality Control Agreement in respect of work in the construction industry. He further submits that the grievance pertains exclusively to non-construction work, and that the Board lacks jurisdiction under section 124 to hear it. In support of that position he referred the Board to *The Master Insulators Association of Ontario, Inc.*, [1980] OLRB Rep. Oct. 1497, and *Inscan Contractors (Ontario) Inc.*, [1986] OLRB Rep. May 640.

7. Counsel for the applicant contends that the Board does have jurisdiction to hear and determine this referral under section 124 of the Act. He advised the Board that it is his client's position that the work involved "may well include a construction component", but also indicated that the applicant does not have sufficiently detailed information about the work to know if it is construction or non-construction. In support of the applicant's position, counsel referred the Board to *Carroll Electric (1982) Limited*, [1983] OLRB Rep. Aug. 1282.

8. The aforementioned two decisions to which respondent's counsel referred in argument (*The Master Insulators Association of Ontario, Inc.*, and *Inscan Contractors (Ontario) Inc.*) provide useful guidelines for distinguishing between "repair", which is generally construction work, and "maintenance", which is generally non-construction work. (See in this regard section 1(1)(f) of the Act). However, we do not find those decisions to be of assistance in resolving the "preliminary issues" raised by the respondent in respect of our jurisdiction to hear this referral under section 124, as they do not purport to determine whether or not the Board's jurisdiction under that provision is confined to grievances which pertain exclusively to construction work, as contended by the respondent.

9. Section 124(1) provides as follows:

Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

That provision permits "a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions" to refer a grievance concerning that agreement to the Board for final and binding determination. Section 117 of the Act provides, in part, as follows:

In this section and in sections 118 to 136,

(a) "council of trade unions" means a council that is formed for the purpose of representing or that according to established bargaining practice represents trade unions as defined in clause (f);

• • •

(c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

(d) "employers' organization" means an organization that is formed for the purpose of representing or represents employers as defined in clause (c);

• • •

(f) "trade union" means a trade union that according to established trade union practice pertains to the construction industry.

10. The applicant, which is composed of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, is a "council of trade unions" within the meaning of section 117(a). The respondent "operates a business in the construction industry" and, accordingly, is an "employer" within the meaning of section 117(c). In this regard, we note that the section 117(c) definition of employer is not limited to persons who operate a business *exclusively* in the construction industry (see *Carroll Electric (1982) Limited, supra*, at paragraph 16); indeed, it is well established in the Board's jurisprudence that to be operating a business in the construction industry does not require that the "construction" business be the primary or predominant business of the employer, or the "general nature" of the employer's business: see, for example, *Abitibi-Price Inc.*, [1986] OLRB Rep. Dec. 1613, at paragraphs 38 - 43. It is also clear from the fact that the Association has been granted accreditation by the Board (under section 127 of the Act) that it is an "employers' organization" within the meaning of section 117(d). Thus, in the instant case, the applicant, which is a party to a "collective agreement" (the Quality Control Agreement) between an "employers' organization" (the Association) and a "council of trade unions" (the applicant), within the meaning of section 124, has referred to the Board a grievance concerning the interpretation, application, administration or alleged violation of that agreement, which is undisputedly binding upon the respondent in respect of construction work, and which, if the applicant's position proves to be valid, may also be binding upon it in respect of "maintenance" work. Accordingly, we are satisfied that we have jurisdiction to hear and determine the grievance under section 124. (See, generally, *Carroll Electric (1982) Limited, supra*, at paragraph 16, in which the Board held that it had jurisdiction under section 124 to hear a grievance which pertained to both construction and non-construction work, where the applicant, which was a "trade union" within the meaning of section 117(f), had a collective agreement with the respondent, which was an "employer" within the meaning of section 117(c).) If the applicant's alternative position proves to be valid, with the result that there is a separate collective agreement (included in Exhibit 5) binding upon the applicant and the respondent in respect of "maintenance" work, it may be that the Board would still have jurisdiction to hear and determine the grievance under section 124, as that agreement would be a collective agreement between an "employer" (the respondent) or an "employers' organization" (the Association), and a "council of trade unions" (the applicant), within the meaning of section 117. However, it is unnecessary to decide that issue at this point in the proceedings.

11. If, as contended by the respondent, the Quality Control Agreement applies only to con-

struction work, and all of the work covered by the grievance is non-construction work, the grievance may ultimately be dismissed. However, those are matters which form an integral part of the merits of the grievance, and can only be determined after hearing the evidence and submissions of the parties concerning the grievance.

12. The Registrar is directed to list this matter for the purpose of hearing the evidence and representations of the parties with respect to all outstanding matters arising out of and incidental to this referral. If, in view of the appointment of Board Member I.M. Stamp as a Vice-Chair effective September 21, 1987, the parties consent to the substitution of another Board Member to replace her (or to the substitution of two other Board Members to replace Board Members Stamp and Balentine), the hearing will proceed before a panel chaired by the writer. Otherwise, the proceedings will be scheduled before an entirely new panel.

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**3060-86-U Toronto Typographical Union No. 91, Complainant v. Burlington Air Express (Canada) Ltd., Respondent**

**Unfair Labour Practice - In earlier proceeding respondent ordered to compensate employee for reducing his working hours contrary to the Act - Employee later resigning but requesting part-time work - Respondent refusing to re-hire employee on a part-time basis - Evidence insufficient to show total absence of anti-union animus - Respondent ordered to offer a part-time position to the employee**

**BEFORE:** *Judith McCormack*, Vice-Chair, and Board Members *G. O. Shamanski* and *L. Lenkinski*.

**APPEARANCES:** *Nelson Roland, Douglas W. Grey, Robert Miller, Ian W. Taylor* and *Joe Bigeau* for the applicant; *David L. Brisbin, Wm. Machika* and *Guy Cranston* for the respondent.

**DECISION OF JUDITH MCCORMACK, VICE-CHAIR, AND BOARD MEMBER L. LENKINSKI;** August 31, 1987

1. The name of the respondent is amended to read: "Burlington Air Express (Canada) Ltd.".
2. This is a complaint under section 89 of the *Labour Relations Act* in which it is alleged that the respondent contravened sections 80(1) and 66 of the Act by refusing to re-employ Robert Miller as a result of his testimony on behalf of the complainant in previous proceedings before the Board, and his picketing activities during a lengthy lockout.
3. The respondent operates an air express and air freight business in which Mr. Miller commenced employment as a warehouse employee in September of 1984. His duties in this regard involved loading and unloading trucks and containers and some order picking. Mr. Miller worked until May 8, 1985, when the respondent locked out its employees in the course of a labour dispute. A picket line was established by the union at that time and Mr. Miller appears to have been a regular picketer throughout the fourteen-month period of the lockout.
4. In the course of that dispute, the union initiated a number of proceedings before the

Board, including complaints under section 89 of the *Labour Relations Act*, a complaint under the *Occupational Health and Safety Act*, and applications under sections 93 and 40a of the *Labour Relations Act*. These matters were eventually consolidated for hearing and culminated in two decisions of the Board, *Burlington Northern Air Freight (Canada) Ltd.*, unreported, Board File No. 0819-86-FC, July 10, 1986 and *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Dec. 1628. Although it is difficult to summarize these decisions, particularly the latter which is comprehensive and detailed, it is possible to say briefly that the union was substantially successful in its claims. As a result, the Board made a number of remedial orders and directions.

5. The evidence before us indicated that Mr. Miller testified on behalf of the union in the course of those proceedings. His testimony took approximately two hours and primarily addressed a reduction in his hours of work and a conversation he had with Greg Richard, a district operations manager for the respondent. Among its many findings, the Board made the following determinations with respect to those events (*Burlington Northern*, Dec., *supra*):

34. Certain actions that were taken by management following certification also heightened the Union's anxiety about the implications of the Company's proposals. In mid December of 1984, the Company eliminated a driver's position and a warehouseman's position on the day shift. The two employees whose positions were eliminated bumped two other employees with less seniority. One of them (Allen Proulx) bumped a warehouseman (Dale Robertson), who was then demoted from "full-time" employment (with full benefits) to "part-time" employment. Following his demotion, he worked between 35 and 40 hours per week without benefits. (No employees were laid off as a result of that change, because two low seniority employees left the employ of the Company the week before the change.) Furthermore, the Company reduced Robert Miller and Dan Poutsoungas to 24 hours of work per week. Prior to that reduction, those two warehouse workers had each generally averaged approximately 32 hours of work per week for Burlington. (They were initially hired by Burlington in late September of 1984 as temporary employees, to assist the warehouse staff in handling a large volume of automotive promotional material which required distribution on behalf of one of the Company's customers. However, following a four-day lay-off at the end of November, they were called back to work because they were needed to help unload trucks.) When Mr. Taylor, who was their lead hand, complained to Mr. Evans about that reduction, which had made it more difficult for Mr. Taylor and the others on his shift to complete all the necessary work, Mr. Evans confirmed Mr. Taylor's suspicion that their hours had been reduced "because of the Union", so as to remove them from the bargaining unit. (Mr. Miller subsequently returned to the bargaining unit when his supervisor arranged for him to obtain more hours of work with the Company by switching hours with his brother Steven, who had another job in addition to his position with Burlington.)

35. In reducing the hours of work of Mr. Miller and Mr. Poutsoungas "because of the Union", the respondent contravened sections 64 and 66 of the Act. The same is true of Mr. Robertson's demotion, which was also motivated at least in part by anti-union considerations. Under the circumstances, it is unnecessary to determine whether those actions were also violative of section 79.

\* \* \*

98. When Mr. Richard handed that memo to Claudio Cristini, he asked him if he fully understood the last paragraph, and stated that it was Mr. Cristini's choice to go in and sign the contract by himself or with other people. Robert Miller was also given a copy of that memo by Mr. Richard on May 7 when Mr. Miller arrived at the warehouse to begin work at 4:00 p.m. Approximately two hours later, Mr. Richard approached Mr. Miller in the warehouse and asked him if he had switched hours with his brother (Steven Miller). After Mr. Miller confirmed that he had done so, Mr. Richard asked him when that had occurred. When Mr. Miller indicated that the switch of hours had been in place for about a month, Mr. Richard stated that Mr. Miller had not yet completed his probationary period "by working regular hours". Mr. Richard also told him that he had the option of either accepting the Company's offer or being locked out, but added that if he did not accept the offer, his employment could be terminated in view of his probationary status. Although Mr. Miller elected not to accept the offer (and was locked out with

the rest of his co-workers), he had not been discharged by Burlington as of January 7, 1986 when he testified before the Board in these proceedings, nor is there any evidence that he was subsequently discharged by the Company. Nevertheless, it is clear that the respondent, through Mr. Richard, contravened section 66 of the Act by suggesting that Mr. Miller might be dismissed if he declined to accept the Company's final offer.

6. The following remedies ordered by the Board relate in some part to those findings:

125. For the foregoing reasons, the Board, in the exercise of its remedial discretion under sections 89 and 93 of the *Labour Relations Act*, and section 24 of the *Occupational Health and Safety Act*, hereby declares that the respondent has contravened sections 15, 64, 66, 70, and 79 of the *Labour Relations Act*, and section 24(1) of the *Occupational Health and Safety Act*, and hereby directs that the respondent:

- (1) cease and desist from contravening sections 64, 66, and 70 of the *Labour Relations Act*, and section 24(1) of the *Occupational Health and Safety Act*;
- (2) pay to the Union, and to bargaining unit employees, compensation for their respective losses resulting from the respondent's unlawful acts and omissions, including, but not limited to:

• • •

- (ii) bonuses and other losses resulting from the respondent's contraventions of section 66 of the Act;

• • •

- (5) compensate Robert Miller and Dan Poutsoungas for wages and benefits lost as a result of the respondent's unlawful reduction of their working hours;

• • •

- (8) pay interest on the compensation ordered by the Board, such interest to be calculated (in respect of wages and other losses which accrued over a period of time) in accordance with Practice Note 13, dated September 8, 1980; and
- (9) post copies of the attached notice marked "Appendix", after being duly signed by an authorized representative of the respondent, in conspicuous places at its Toronto station, where they are likely to come to the attention of bargaining unit employees, and keep them posted for sixty consecutive working days. Reasonable steps shall be taken by management to ensure that the notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the Union so that it can satisfy itself that this posting requirement is being complied with.

7. The Notice to Employees ordered by the Board contains the following paragraph:

We have posted this notice in compliance with an order of the Ontario Labour Relations Board issued after a hearing in which we, Rick Best, and the Toronto Typographical Union, Local 91 (referred to in this Appendix as the "Union") participated. The Ontario Labour Relations Board found that we violated the *Labour Relations Act* by various acts and omissions, including failing to follow established practices regarding shift bids, annual pay increases, ninety-day reviews for probationary employees, uniforms, and discipline; using written warnings and suspensions to punish employees for having unionized; reducing the working hours of Robert Miller and Dan Poutsoungas, and subsequently discharging Mr. Poutsoungas; demoting Dale Robertson; failing to bargain in good faith and make every reasonable effort to make a collective agreement; and unlawfully locking out bargaining unit employees.

8. The lockout came to an end in July of 1986 after the Board directed the settlement of a

first collective agreement in *Burlington Northern*, July, *supra* and Mr. Miller returned to work. On September 23, 1986, he wrote the following letter to the company:

Due to acceptance of a recent job offer, I will terminate employment (day shift), at Burlington Northern, on Friday October 3, 1986.

Viable options, such as working on weekends or during the afternoon shift (starting time of 1900 hours), will allow me continuous employment with the company.

Your response to the aforementioned arrangements will be appreciated.

His last day of work was October 3, 1987.

9. Subsequently both Joe Bigeau, then vice-president and international organizer for the complainant, and Ian Taylor, the complainant's chapel chairman, raised the possibility of Mr. Miller being re-hired as a part-time employee on a number of occasions with various members of management. In October, Mr. Taylor approached Al D'Oliveira, the day warehouse supervisor, and advised him that Mr. Miller wished to work on a part time basis. At that time, employees were working a considerable number of overtime hours on Saturdays and Sundays and Mr. Taylor asked Mr. D'Oliveira if he had any objections to Mr. Miller working on Saturdays. Mr. D'Oliveira replied that he had no objections and said that he would check it out and get back to Mr. Taylor. A week later he told Mr. Taylor that it seemed "okay" to him, but that Mr. Miller would have to come in, fill out a new application form and leave it with the night operations manager, Naida Maynard. Mr. Taylor then relayed this information to Mr. Miller. Some time later, Mr. Taylor approached Mr. D'Oliveira again and asked him whether Mr. Miller would be hired or not. Mr. D'Oliveira replied that he couldn't hire him.

10. Mr. Taylor then went to Mr. D'Oliveira's superior, Bob Erent, and told him that he didn't understand what was going on since Mr. D'Oliveira, who usually did the hiring, had no complaints about Mr. Miller but said that he couldn't re-hire him. Mr. Erent told Mr. Taylor that he would check into it and asked him to come back the next day. When Mr. Taylor returned the following day, Mr. Erent informed him that there was nothing that he could do, and that the matter was out of his hands. Mr. Taylor then took up the problem with Greg Richard, the respondent's district operations manager who represented the next level of management. He also agreed to look into the matter, although he did not subsequently get back in touch with Mr. Taylor. Both Mr. Erent and Mr. Richard left the employ of the respondent on October 15th and October 13th respectively. At the same time, Mr. Bigeau was also pursuing part-time work for Mr. Miller with the respondent. When he approached Mr. Richard in this regard, the latter replied by putting up his hands and saying that it was not really up to him.

11. Mr. Bigeau then raised the issue again at a labour management meeting in December with William Machika, the respondent's Canadian managing director. No response was forthcoming. At some point in the fall another union official, Doug Grey, made a similar request of Guy Cranston, the respondent's regional manager for Ontario and Manitoba. Mr. Cranston refused to discuss the matter as Mr. Miller was no longer in the bargaining unit. On November 13th, Mr. Miller filled out a new application for employment and left it on Ms. Maynard's desk. On November 15th, the respondent hired Peter Calandra to work solely on Saturdays in the warehouse. Mr. Calandra had worked for the respondent previously when he was hired to replace regular employees during the lockout. He was laid off as a result of the end of the lockout and the return to work of regular employees.

12. The evidence before us indicates that the usual hiring process at the time involved either Mr. D'Oliveira or other warehouse supervisors making effective recommendations to Mr.

Richard or Ms. Maynard who would then make the formal decision. None of the people normally involved in hiring in this manner testified before us, nor did anyone who was identified as having made either an effective recommendation or the actual decision not to re-hire Mr. Miller. However, Mr. Machika gave evidence with respect to his views as to why Mr. Miller had not been hired and suggested a number of reasons in this regard.

13. We have a number of concerns about the presentation of the respondent's reasons for not hiring Mr. Miller in this manner. Section 66 provides as follows:

No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

Section 80(1) sets out the following:

No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

Section 89(5) further provides:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 the Board describes the nature of the onus in proceedings such as this:

What then is the extent of the burden of proof that has been shifted by statute to the respon-

dent? The Act speaks of the burden of proof "that any employer...did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of the jurisprudence, see *Delhi Metal Products Ltd.* [1974] OLRB Rep. March 450. In other words, the appearance of a legitimate reason for a discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts, first, that the reasons given for the discharge are the only reasons and, second, that there reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

14. In this case, Mr. Machika did not claim either to have made the decision not to hire Mr. Miller or to have been informed of the reasons by someone who was. Rather, it appeared that Mr. Machika's views were more in the nature of educated speculation. In his testimony, he identified Mr. Richard as the person who was responsible for hiring at the time in question.

15. The evidence of the person who made the decision not to hire Mr. Miller is critical in this case. We cannot be satisfied in the circumstances before us that the reasons for not hiring Mr. Miller were free from anti-union animus unless we have an opportunity to hear what those reasons actually were. Although we note that both Mr. Erent and Mr. Richard have since left the employ of the company, neither this fact nor any other reasons was advanced for the failure of a witness to testify in this regard. As a result, it is difficult to avoid the inference that the evidence which might have been given would have been unfavourable to the respondent or would not have supported its position. In this regard, the Board has previously adopted the following passage from the headnote of *Holmes v. Alexon*, [1975] 7 O.R. (2d) 11 in *McGregor Hosiery*, [1976] OLRB Rep. Oct. 583 and *B. & S. Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645:

Where a party or witness fails to give evidence which was within his power to give and by which relevant facts might have been elucidated, the court is justified in drawing the inference that the evidence which might have been given would have been unfavourable to the party to whom the failure is attributed.

16. In light of both the burden of proof upon the respondent and the questions raised by the evidence that was presented in this case by the complainant, we find that the evidence adduced on behalf of the respondent is insufficient to satisfy us that on the balance of probabilities, its conduct was wholly free from anti-union animus.

17. We also find the reasons suggested by Mr. Machika for the refusal to hire Mr. Miller unconvincing. Firstly, Mr. Machika told the Board that the fact that Mr. Miller was only available at certain times, that is, either on weekends or starting at 7:00 p.m. on the afternoon shift, would create problems for the respondent. Considerable evidence with respect to whether there was work available at these times was adduced by both parties. The evidence led by the complainant indicated that employees were annoyed because they were working so much overtime on weekends, and that the complainant had raised this problem with the respondent on several occasions. The respondent's evidence indicated that the overtime hours were necessary to cover contingencies such as absent employees, a problem which was not amenable to the hiring of more staff because of the irregular incidence of absenteeism. In the circumstances of this case, it is unnecessary for us to address the matter of overtime as the hiring of Mr. Calandra during the period in question solely for Saturday work demonstrates both that there was work available and that it was available on the terms Mr. Miller desired. Thus we find the decision to employ Mr. Calandra tends to undermine the respondent's assertions with respect to the availability of work for Mr. Miller.

18. Secondly, it was suggested that Mr. Miller was not sufficiently aggressive to handle the job in terms of individual initiative. Mr. Machika conceded that Mr. Miller had an unblemished record, although he testified that he was only an average employee. Since he did not supervise Mr. Miller, he drew his conclusions in this regard both from a personnel file which he reviewed in preparation for the hearing, and from what he considered to be Mr. Miller's failure to pursue part-time employment with the respondent vigorously enough.

19. We find these reasons similarly unpersuasive. The personnel file in question appears to have contained very little information, and nothing specifically related to Mr. Miller's aggressiveness or initiative. Mr. Miller appears to have taken normal steps to apply for employment, and he told the Board that he was relying on Mr. Taylor and Mr. Bigeau to pursue the matter on his behalf because he was trying to "do things through the proper channels". Given the persistence of Mr. Bigeau and Mr. Taylor in this regard, we find it difficult to understand how the respondent could conclude from the sequence of events described above that Mr. Miller was not aggressive enough for what was essentially a warehouse/driver job. Mr. Machika also agreed that he knew nothing about Mr. Calandra's job performance.

20. In addition Mr. Machika testified that the respondent wanted employees with "D" drivers' licences as this is a requirement under the collective agreement, a qualification which Mr. Miller does not possess. However, it was common ground that the part-time work requested by Mr. Miller was not covered by the collective agreement, which in any event gives new employees up to ninety days to acquire such a licence. We note that this reason, like those above, was not mentioned by the various members of management during any of the conversations described earlier with respect to Mr. Miller.

21. Counsel for the respondent argued that Mr. Miller's testimony was such a minor part of the lengthy hearings and such a small part of the ultimate decision that we should conclude it had little impact and would not have prompted the respondent to refuse to hire him for this reason. In addition, it was noted that other employees who had both testified and picketed had not suffered any reprisals. We find these facts inconclusive. While it is clear that Mr. Miller's testimony was only one part of very extensive proceedings, we are not prepared to speculate as to the effect it might have had on the Board. There is no doubt that Mr. Miller did testify, and that findings unfavourable to the respondent were made with respect to events about which he testified. These facts, together with the implausibility of the reasons advanced by the respondent for the decision not to hire Mr. Miller and the speculative manner in which those reasons were presented leave us unable to conclude that Mr. Miller's activities played no role in the respondent's decision.

22. The fact that other employees who testified or picketed have not been subjected to reprisals is not insignificant. However, there was no evidence that any of these other employees had placed themselves in Mr. Miller's vulnerable position by resigning and reapplying for employment. In these circumstances we do not find the comparison to be particularly telling.

23. For the foregoing reasons we find that the respondent has violated sections 66 and section 80(1) of the *Labour Relations Act*, and we hereby direct that the respondent:

- a) forthwith offer a part-time position without discrimination to Mr. Miller;
- b) pay to Robert Miller compensation for any loss of wages and benefits as a result of the respondent's failure to employ him;
- c) cause copies of the attached notice marked Appendix as supplied by

the Board to be signed by an authorized representative of the respondent and posted in conspicuous places on its premises and keep such notices posted for sixty (60) working days and take all reasonable steps to ensure that the notices are not altered or defaced or covered by any other material; and

- d) provide reasonable access to a representative of the complainant from time to time during the aforesaid sixty (60) day period to permit the complainant to satisfy itself that the respondent has complied with the posting order in paragraph (c).

24. The Board remains seized to resolve any dispute with respect to implementing this decision.

#### **DECISION OF BOARD MEMBER G. O. SHAMANSKI;**

1. I am satisfied that on the basis of the evidence before this Board, there was no anti-union animus on the part of the Company with respect to not re-employing R. Miller in the capacity of a part-time employee for the following reasons:

It was without reservation that R. Miller did on September 13, 1986 voluntarily submit to the Company his resignation to be effective October 3, 1986 to accept employment elsewhere.

His written resignation to the Company did in part orchestrate a desire to obtain part-time employment with the Company. The part-time work he was seeking specified:

Ex II Viable options, such as working weekends or during the afternoon shift. (starting time of 1900 hours), will allow me to continue employment with the Company.

First of all, Miller resigned from the Company's employ to accept employment with the Toronto Board of Education as a library clerk. In the next breath he says he wants to continue employment with the Company. This would lead one to ponder where Miller's loyalties are.

It should be noted that in response to a question on the application for employment form. If necessary, are you willing to work overtime. Mr. Miller's written response was *to be discussed*. In dictating restrictive conditions, i.e. starting time - weekends - ambiguous response to availability for overtime work. Mr. Miller did not enhance his profile as a reliable candidate for employment consideration.

2. One would assume from his voluntary resignation that he automatically severed his relationship with the Company and was certainly not in a position to dictate terms of re-employment under any circumstances.

3. Mr. Miller's only ongoing contact with respect to obtaining part-time work with the Company following his resignation was with Joe Bigeau, Vice-President & International Organizer TTU #91 and Ian Taylor, the TTU #91 Chapel Chairman. It would be prudent to note at this juncture that the part-time work Miller was seeking with the Company is not within the scope of

the TTU bargaining rights. Neither Bigeau or Taylor are entrusted with the authority to hire people for the Company nor was it established throughout any of these proceedings that either of these two persons were respected for their resources in recommending people for employment to the Company.

4. The relationship of the parties has been strained over the past few years. Considering this fact one may well cogitate is there an ulterior motive on the Union's part in this whole scenario?

5. I would attach little weight to the remiss of the Company in not calling Erent or Richard as witnesses in this case.

6. For the aforementioned reasons, I would have dismissed the complaint.

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**0037-85-U; 0446-85-U; 0039-85-OH** Toronto, Typographical Union, Local 91, Complainant v. **Burlington Northern Air Freight (Canada) Ltd.**, Respondent; Rick Best, Complainant v. Burlington Northern Air Freight (Canada) Ltd., Respondent.

**Damages - Unfair Labour Practice - Complaints relisted for hearing for the purpose of determining quantum of damages - Damages for loss of opportunity to negotiate a collective agreement discussed - Interest rate determined for complaints that were filed in different months - Costs denied - Respondent ordered to compensate union for half of its reasonable negotiating expenses - Union entitled to be reimbursed for costs incurred in producing materials regarding the lock-out - Duty of locked out employees to mitigate their damages reviewed - Lock-out pay provided to employees by the international union a compensable loss**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

**APPEARANCES:** *M. Cornish, Doug Gray and Rick Best* for the complainants; *D. L. Brisbin, William Machika and Mary Hauler* for the respondent.

**DECISION OF THE BOARD;** August 17, 1987

1. In a decision dated December 19, 1986 regarding these matters (referred to herein as the "Decision"), the Board (with Board Member I. M. Stamp dissenting with respect to the majority's conclusion that the lock-out described in the Decision was unlawful) found that the respondent had contravened sections 15, 64, 66, 70, and 79 of the *Labour Relations Act* (the "Act") and section 24(1) of the *Occupational Health and Safety Act*, and directed that the respondent:

- (1) cease and desist from contravening sections 64, 66, and 70 of the *Labour Relations Act*, and section 24(1) of the *Occupational Health and Safety Act*;
- (2) pay to the Union, and to bargaining unit employees, compensation for their respective losses resulting from the respondent's unlawful acts and omissions, including, but not limited to:

- (i) wages, benefits, and other losses resulting from the respondent's contraventions of section 79 of the Act;
  - (ii) bonuses and other losses resulting from the respondent's contraventions of section 66 of the Act;
  - (iii) losses incurred as a result of the respondent's contravention of section 15 of the Act; and
  - (iv) losses (including losses incurred by employees in respect of Canada Savings Bonds which were being purchased by payroll deduction) sustained as a result of the unlawful lock-out;
- (3) revoke and remove from its files and records the aforementioned unlawful written warnings to Rick Best, Mark Wells, Brian MacDonald, James Brown, and Dale Robertson;
  - (4) revoke and remove from its files and records the aforementioned unlawful suspensions of Rick Best, D. J. Simec, and Dale Robertson, and compensate them for wages and benefits lost as a result of those unlawful suspensions;
  - (5) compensate Robert Miller and Dan Poutsoungas for wages and benefits lost as a result of the respondent's unlawful reduction of their working hours;
  - (6) compensate Dale Robertson for wages and benefits lost as a result of his unlawful demotion;
  - (7) reinstate Dan Poutsoungas and compensate him for lost wages and benefits;
  - (8) pay interest on the compensation ordered by the Board, such interest to be calculated (in respect of wages and other losses which accrued over a period of time) in accordance with Practice Note 13, dated September 8, 1980; and
  - (9) post copies of the attached notice marked "Appendix", after being duly signed by an authorized representative of the respondent, in conspicuous places at its Toronto station, where they are likely to come to the attention of bargaining unit employees, and keep them posted for sixty consecutive working days. Reasonable steps shall be taken by management to ensure that the notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the Union so that it can satisfy itself that this posting requirement is being complied with.

(See *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Dec. 1628, at paragraph 125. For ease of exposition, that part of the Decision is referred to herein as the "Direction", and the complainant trade union is referred to as the "Union" or "Local 91".)

2. Counsel for the complainants subsequently wrote to the Board to request that these complaints be relisted for hearing for the purpose of resolving certain outstanding questions with regard to damages payable by the respondent pursuant to the Direction. The requested hearing was held on May 28, 1987. Thereafter, on the agreement of the parties, written argument pertaining to the respondent's liability in respect of lock-out pay was filed by complainants' counsel on June 22, 1987 and by respondent's counsel on July 13, 1987.

3. The parties seek guidance from the the Board with respect to the principles to be applied in quantifying the compensation awarded by certain portions of the Direction. They also seek to have the Board exercise its power under section 103(2)(g) of the Act to appoint a Board Officer to do an accounting, by receiving oral and written evidence, and reporting to the Board concerning factual issues remaining in dispute.

4. In paragraph 16 of the Decision, we found that the respondent (also referred to in this decision as the "Company") had contravened section 79 of the Act by withholding the employees' annual pay increase in November of 1984. The parties are in agreement that for purposes of quantifying that aspect of the direction, the amount of that pay increase should be 4% (based upon the increase in the Consumer Price Index between November of 1983 and November of 1984). However, they have been unable to agree on whether, on the basis of the pattern established in 1982 and 1983, that increase would have been paid on November 15, 1984, as submitted by respondent's counsel, or earlier in the month, as contended by complainants' counsel. Accordingly, that is one of the factual issues to be dealt with in proceedings before a Board Officer. However, as indicated at the hearing of this matter, we sincerely hope that the parties will endeavour to resolve that relatively trivial matter without the need for further adjudication.

5. In paragraph 22 of the Decision, we found that the respondent had contravened section 66 of the Act by withholding the profit-sharing bonus which it had planned to give to its employees prior to the end of 1984. The parties are in agreement that the amount of bonus to be paid to individual employees should, if possible, be determined by reference to documentation prepared by management in 1984 concerning that bonus. They are also in agreement that if what remains of such documentation is insufficient to resolve the matter, the amount of bonus to be paid to individual employees should be determined by assuming that a second bonus equal to the bonus paid to individual employees in June of 1984 would have been paid to them prior to the end of 1984.

6. In its landmark decision in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, the Board directed an employer, which had failed to bargain in good faith and make every reasonable effort to enter into a collective agreement, to compensate bargaining unit employees for monetary losses arising from a loss of opportunity to theretofore negotiate a collective agreement. In concluding that the Board had jurisdiction to award such damages, and that it should exercise that jurisdiction, G. W. Adams, who was the Chairman of the Board at that time, wrote, in part, as follows:

100. .... What trade unions like the Complainant and the employees it represents lose in cases of this kind is "the loss of an opportunity" to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time. Employees join a trade union with, in their minds at least, the reasonable prospect of obtaining an improvement in their working conditions. In fact, the Complainant may be able to statistically document the reasonableness of such employee expectations. When an employer responds with flagrant unfair labour practices, he wrongly prevents his employees from realizing their expectations or delays having to deal with any of their demands. For example, an employer may be able to escape with no contract at all if the initial organizing strength of the union can be so eroded by unfair labour practices that a strike can be outlasted. Moreover, the employer receives an unfair competitive advantage over those employers who do bargain in good faith, making the unlawful conduct attractive to other employers. In labour relations terms these employee losses are real; the potential employer gains unjust; and both are accomplished by the violation of a fundamental duty imposed by the legislation - bargaining agent recognition. The failure to consider any monetary relief seems to encourage these consequences. See generally: Note, *An Assessment of the Proposed Make Whole Remedy in Refusal to Bargain Cases* (1968), 67 Mich. L. Rev. 374; Note, *An Analysis of The NLRB Objections To a Make Whole Remedy in Refusal to Bargain Cases* (1971), 3 Rutgers-Camden L.J. 272.

101. It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature.... The argument, however, is inconsistent with the long accepted principle that one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See *Mayne and McGregor on Damages* 12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages. Business losses in commercial law suits and the compensation awarded in personal injury cases to persons who may never have been employed are important examples. See for example: *Withers v. General*

*Theatre Corporation*, [1933] 2 K.B. 536; *Roach v. Yates*, [1938] 1 K.B. 256 (C.A.). Even more directly in point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.

After reviewing a number of judicial and administrative authorities concerning damages for "loss of an opportunity", the Board concluded that part of the decision as follows:

115. We are sensitive that too arbitrary an approach to this kind of monetary loss might have the effect of unduly burdening employers and, accordingly, we embark on this new direction with caution. However, if we make no effort to chart this course, employees and trade unions will continue always to bear the loss. The fear of over compensation, in many contexts, has all too often resulted in no compensation with iniquitous results. To a very real extent, bargaining orders simply direct an employer to do what was originally required except that by virtue of the unlawful conduct the employer may have weakened the bargaining position of the union and thereby strengthened his own position. If awarding employees compensation for economic losses established by reasonable proof has the incidental effect of making such misconduct less attractive, it would be unduly restrictive to rule out this more effective remedy because of the incidental deterrent effect. Clearly, the preamble to the Act demands this Board to devise a compensatory remedy where this is at all possible. See Note, *The Need for Creative Orders Under Section 10(c) of the NLRA* (1963), 112 U.Pa.L.Rev.69.

An application for judicial review of that decision was dismissed by the Divisional Court: see *Re Tandy Electronics Limited and United Steelworkers of America et al.* (1980), 115 D.L.R. (3d) 197. (Leave to appeal was denied by the Ontario Court of Appeal on March 10, 1980.) Since then, the Board has awarded damages for "loss of an opportunity" in a number of decisions: see, for example, *Consolidated Bathurst Packaging Limited*, [1983] OLRB Rep. Sept. 1411 (application for reconsideration dismissed in [1983] OLRB Rep. Dec. 1995), and [1984] OLRB Rep. March 422; *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453; and *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401.

7. In paragraph 124 of the Decision, we wrote, in part, as follows:

124. With respect to the respondent's breach of section 15, as recently noted by the Board in *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453, at paragraph 58, "[t]he justification for an award of damages for breach of the duty imposed by section 15 of the Act and the basis on which such damages might be assessed were both explored at length in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at paragraphs 96 to 115, *Canada Cement Lefarge Ltd.*, [1981] OLRB Rep. Dec. 1722, and *Fotomat Canada Limited*, [1982] OLRB Rep. July 1020." Although not every contravention of section 15 will result in an award of damages (see *Canada Cement Lefarge*, *supra*, at paragraph 26), we are satisfied that such an award is appropriate in the instant case....

Thus, as recognized by complainants' counsel and respondent's counsel, our direction (contained in part 2(iii) of paragraph 125 of the Decision) that the respondent pay compensation for "losses incurred as a result of the respondent's contravention of section 15 of the Act" includes an award of damages for loss of an opportunity to negotiate a collective agreement before October 1, 1986.

8. Complainants' counsel argued that, but for the respondent's contraventions of the Act, the parties would likely have entered into a collective agreement by May 8, 1985. She further contended that in determining the value of the loss of an opportunity to negotiate a collective agreement prior to October 1, 1986, the Board should find that in November of 1985 there would have been a wage increase of approximately half of the wage increase which this panel of the Board awarded (beyond the aforementioned cost of living increase) when it arbitrated a first collective agreement (in File No. 1223-86-FCA) pursuant to section 40a(4) of the Act (see *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Oct. 1327). That collective agreement became effective on October 1, 1986 (and will remain in effect until September 30, 1988, in accordance with sec-

tion 40a(18) of the Act). Complainants' counsel further submitted that bonuses would have been received by employees in June and December of 1985, and that those bonuses should be taken into account in quantifying the loss of opportunity. Counsel for the respondent, on the other hand, contended that no collective agreement would have been entered into until October 1, 1986. In the alternative, he submitted that the earliest date at which there would likely have been a collective agreement was July 10, 1986 (the date on which the Board directed the settlement of a first collective agreement between the Union and the respondent). He also argued that there would not have been a wage increase in November of 1985, because the respondent was in financial difficulty at that time. (There is a dispute between the parties as to whether that financial difficulty resulted from "flat conditions" in the air freight business, as contended by the Company, or from the unlawful lock-out, as contended by the Union.) However, as an alternative position, he acknowledged that if the Board concluded that there would have been a wage increase at that time, there might be some rationale for quantifying it by halving the wage increase included in the arbitrated first collective agreement.

9. As indicated in our Decision, during the twenty days of hearing which were devoted to these consolidated complaints, the Board received detailed evidence concerning the various proposals submitted by the Union and the Company, their respective bargaining strengths and strategies, and related matters (see, for example, paragraphs 29-33, 36-52, 56-61, 66-70, 73-77, 81-86, 94, and 109-111). Having regard to the totality of the evidence and the submissions of the parties, we are satisfied that, more likely than not, a collective agreement would have been entered into by May 8, 1985, if the respondent had fulfilled its statutory duty to bargain in good faith and make every reasonable effort to make a collective agreement. We are further satisfied that the collective agreement would likely have included a wage increase of approximately half of the wage increase which this panel of the Board awarded (beyond the 4% cost of living increase referred to in paragraph 4 of this decision) when we arbitrated the aforementioned collective agreement. Although it is not possible to determine with mathematical precision when that wage increase would have been become effective, we have concluded that it would probably have been implemented by the 1985 anniversary date of the aforementioned increase which would have been given to employees in November of 1984 but for the respondent's contravention of section 79 of the Act. However, we have also concluded that a discount factor of 25% should be applied in calculating the compensation payable under this head of damages, to take into account various contingencies, such as the possibility that the employees might have had to go on strike to obtain a collective agreement, and the possibility that they might have accepted a somewhat smaller wage increase. With respect to the matter of bonuses, we did not find it appropriate to include a bonus provision in the arbitrated collective agreement, and we are of the view that it is unlikely that a bonus provision would have been included in a collective agreement negotiated by the parties. Accordingly, bonus payments should not be taken into account in quantifying the losses incurred as a result of the respondent's contravention of section 15 of the Act.

10. The Union is entitled to be paid by the Company an amount equal to the Union dues and special assessments which would have been paid by bargaining unit employees from May 8, 1985 (i.e., the date by which the parties would likely have entered into a collective agreement but for the respondent's contraventions of the Act) to October 1, 1986 (i.e., the date on which the arbitrated collective agreement became effective). The compensation otherwise payable to bargaining unit employees for wages lost during that period is to be reduced by that amount (on a *pro rata* basis), since those Union dues and special assessments would have been deducted from their wages if there had been a collective agreement in force during that period.

11. We agree with the submission of counsel for the complainants, which was not seriously disputed by Company counsel, that a negotiated collective agreement would likely have extended

full benefits to "permanent irregular employees", as did the arbitrated collective agreement. Complainants' counsel argued that the appropriate way to redress that loss would be for the respondent to pay to those employees an amount equal to the premiums which would have been paid by the respondent to provide them with that coverage. Counsel for the respondent, on the other hand, contended that the Company's obligation should not be to pay premium equivalents, but rather to reimburse employees for any expenses they incurred which would have been covered by the benefit plans. After recessing to consider that matter, we gave an oral ruling (on May 28, 1987) which accepted the respondent's position concerning that issue. In doing so, we took into account the purpose of a remedial determination under section 89 of the Act, which is to place the parties who have been wronged in the position which they would have been in but for the respondent's contraventions of the Act. As noted above, we are satisfied on the balance of probabilities that, but for the respondent's contraventions of the Act, by May 8, 1985 the Union and the respondent would likely have entered into a collective agreement which would have extended full benefit coverage to permanent irregular employees. Thus, from that day forward, those employees would have been entitled to the benefits provided by the respondent's Employee Benefit Plan (referred in Attachment "D" to the arbitrated collective agreement). They would not, however, have been entitled to receive premiums; the premiums required to provide that coverage would have been paid by the respondent to the insurer providing the coverage under that plan. Thus, to direct the respondent to pay those premiums to the employees themselves would be to place them in a different financial position than they would have been in if the respondent had fulfilled its legal obligations under the Act.

12. With respect to O.H.I.P. coverage, we note that it is common ground among the parties that employees who made payments to O.H.I.P. in order to maintain coverage during the lock-out are entitled to be reimbursed by the respondent for those payments. It is also common ground among the parties that if an employee's spouse made such payments in order to maintain family O.H.I.P. coverage, those payments must also be reimbursed by the respondent.

13. The parties are also in agreement that statutory payments, such as those regarding Unemployment Insurance and the Canada Pension Plan, are to be deducted from the sums otherwise owed by the respondent to individual employees, and are to be remitted by the respondent to the appropriate governmental agencies. They further agree that contributions to the respondent's non-contributory pension plan are to be made by the respondent directly to that plan for the period covered by the Board's Direction.

14. In paragraph 17 of the Decision, the Board found that the respondent had contravened section 79 of the Act by denying some of its probationary employees the wage increase that had traditionally been given to probationary employees at the time of their "ninety-day review" at the (successful) conclusion of their probationary period. Counsel for the complainants suggested that the amount of that increase be determined by averaging the increases which were given by the respondent to probationary employees upon successful completion of their respective probationary periods in 1984. In the absence of any suggestion by counsel for the respondent that this manner of determining the amount of the pertinent increases is inappropriate, we accept and hereby adopt the approach proposed by complainants' counsel.

15. In paragraph 18 of the Decision, we found that the respondent had also breached section 79 by changing its practice regarding provision of uniforms. The parties are in agreement that this contravention of the Act should be remedied by the respondent paying to the employees to whom the respondent failed to provide uniforms (upon successful completion of their respective probationary periods) the amount which the respondent would have paid to Unitog Canada Ltd. for supplying and cleaning such uniforms up to May 8, 1985.

16. In paragraphs 34 and 35 of the Decision, we found that the respondent had contravened sections 64 and 66 of the Act by reducing the hours of work of Robert Miller and Dan Poutsoungas, and by demoting Dale Robertson from "full-time" employment (with full benefits) to "part-time" employment (with reduced benefits). In paragraph 25, we found that the respondent had contravened sections 64, 66, 70, and 79 by, among other things, giving Mr. Robertson a two-day suspension. In paragraphs 64 and 65 we found that the respondent's suspension of Rick Best in February of 1985 contravened section 24(1) of the *Occupational Health and Safety Act*. In paragraphs 26 and 27, we found that the respondent had also violated sections 64, 66, 70, and 79 of the Act by, among other things, suspending Mr. Best for three days and suspending D. J. Simec for two days in March of 1985. The parties are in agreement that any unresolved factual issues regarding the resulting wage and benefit losses sustained by those individuals should form part of the Board Officer's inquiry.

17. In paragraph 105 of the Decision, we found that the termination of Dan Poutsoungas (effective May 10, 1985) should be overturned, and we directed the respondent to reinstate him with lost wages and benefits. The Board Officer will also receive evidence concerning those losses if the parties are unable to agree upon their quantification.

18. In paragraph 108 of the Decision, we found that the respondent had further contravened section 79 in 1985 by failing to follow its usual practice of posting a vacation sheet in late April or early May. In that paragraph we also indicated that the respondent would be required to pay compensation for all losses suffered by employees who did not receive their vacation pay at the time at which they would have become entitled to it but for that contravention of the Act. The parties agree that the employees in question did not receive their vacation pay until April of 1986. However, they are in disagreement concerning how the employees' losses should be determined. Complainants' counsel proposes that the Board assume that the vacation pay would have been paid on July 1, 1985, and award interest on it from that date to the date on which it was paid in April of 1986. However, we agree with counsel for the respondent that this approach would overstate the employees' loss, as the vacation pay would not have been payable until the time of their vacation. While it might be possible to determine when an individual would likely have taken his vacation on the basis of the timing of his vacation in previous years, we are of the view that the amount at stake is too small to warrant the expenditure of time and effort which this would entail. Failing agreement of the parties on an appropriate date from which to make the interest calculation, a Board Officer will ascertain the median employee vacation period date for 1984. A date which is one year later than that date will then be used for purposes of interest calculation. The interest on each affected employee's 1985 vacation pay is to be calculated without dividing the vacation pay in half (in view of the fact that the vacation pay would have been payable in its entirety at the time of the vacation and would not have accrued during the period for which interest is payable).

19. The Decision also found losses incurred by employees in respect of Canada Savings Bonds (which at the time of the unlawful lock-out were being purchased by employees through payroll deductions) to be compensable: see paragraphs 106, 118, and 119, and part 2(iv) of the Direction. For employees who borrowed money (at a higher rate than that payable on the master loan referred to in paragraph 106 of the Decision) in order to pay the Company the balance owing on their bonds in a lump sum, that loss consists of the difference between the interest paid to borrow that money and the interest which would have been paid through payroll deductions, plus interest (calculated in accordance with Practice Note No. 13) on that difference. For employees whose bonds were cancelled, that loss consists of the difference between the interest which would have accrued on the bond during the period between the date of cancellation and the bond's maturity date, and the sum obtained by adding the interest which would have been paid by the employee through payroll deductions and the interest (if any) which was earned during that period

by the employee through investment or deposit of the sum received by the employee when the bond was cancelled, plus interest (calculated in accordance with Practice Note No. 13) on that difference.

20. As noted above, part 8 of the Direction ordered the respondent to "pay interest on the compensation ordered by the Board, such interest to be calculated (in respect of wages and other losses which accrued over a period of time) in accordance with Practice Note 13 dated September 8, 1980". The parties have been unable to agree on the applicable interest rate, and on whether or not various sums payable by the respondent should be divided in half for purposes of interest calculation. Paragraph 3 of Practice Note No. 13 indicates that "[t]he appropriate annual interest rate normally applied is the prime rate as determined and published by the Bank of Canada in the *Bank of Canada Review* for the month in which the complaint was filed with the Board." As noted by the Board in *Carroll Electric (1982) Limited*, [1983] OLRB Rep. Dec. 1982, at paragraph 11, "[i]t is clear from Practice Note No. 13, read as a whole, and from the Board's decision in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35, that the applicable rate is not ... the rate which the Bank of Canada charges on its loans to chartered banks, but rather the 'prime rate', which is referred to in the *Bank of Canada Review*, as 'chartered banks rate on prime business loans'." The complaints in File Nos. 0037-85-U and 0039-85-OH were filed with the Board on April 4, 1985. The complaint in File No. 0446-85-U was filed with the Board on May 23, 1985. The prime rate for April of 1985 was 10.75%; it fell to 10.5% in the following month. The three complaints were consolidated by the Board on the first day of hearing (June 5, 1985) and were subsequently heard and decided together. In the circumstances of this case, we find it appropriate that 10.6%, which is the (rounded) average of those two prime rates, be used in calculating the interest payable pursuant to our Direction in this matter. That figure reflects the approach set forth in Practice Note No. 13 (and approximates the average prime rate during the period from the spring of 1985, when the complaints were filed with the Board, to December of 1986, when the Board's decision on the merits of the complaints was issued).

21. The interest calculation described in Practice Note No. 13, and in the *Hallowell* case, *supra*, on which it is based, pertains to wages and other losses which accrue over time. Halving the wage portion of an award is generally appropriate in order to reflect the fact that the total wage loss experienced by an employee does not occur all at once, but accumulates with each pay period following the discharge (or lock-out) of the employee. However, as noted in *Carroll Electric (1982) Limited*, *supra*, at paragraph 12, "such division is not appropriate in respect of amounts which do not accrue over time". It is also not appropriate in respect of periods of time following the accrual period. For example, in the circumstances of the instant case, employees' wage losses accrued during the period of the lock-out (i.e., from May 8, 1985 until employees returned to work in July of 1986, pursuant to section 40a(13) of the Act). Thus, halving the total wages payable to employees during that accrual period of approximately fourteen months is clearly appropriate in calculating the interest payable in respect of that period of time. However, as of the date of the employees' return to work the period of accrual came to an end. But for the unlawful lock-out, the employees would have had the benefit of all of those wages by that date. Thus, during the entire period from that date up to the present time (and continuing until the respondent pays the employees their lost wages), the employees have lost the benefit of the total amount of wages which should have been paid to them during the lock-out. Consequently, halving that sum is neither necessary nor appropriate in calculating the interest payable by the respondent in respect of the period following the lock-out.

22. The Union also contends that the respondent should pay the costs which the Union incurred to obtain:

- (a) legal advice to deal with the respondent's contraventions of the Act;
- (b) legal assistance in drafting these complaints and the applications and other materials filed with the Board in respect of the aforementioned proceedings under section 40a, including the access proceedings and the subsequent arbitration proceedings; and
- (c) legal representation at the hearings held by the Board in respect of these complaints and the proceedings under section 40a of the Act.

The respondent is opposed to making any such payments.

23. In *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, at paragraph 48, the Board, as part of a "make whole order", directed the employer to reimburse the union involved in those proceedings for "all reasonable organizational, bargaining, legal and other expenses associated with its efforts to acquire and pursue its statutory rights", including "the costs of proceedings before the Board". In that case, the employer had closed its Call Answering Service Division in order to "rid itself, once and for all, of the union and its supporters" (see paragraphs 29 to 34). The British Columbia Labour Relations Board adopted a similar approach in *Kidd Brothers Produce*, [1976] 2 Can. LRBR 304. However, in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (in part (d)(i) of paragraph 125), the Board declined to award legal costs in the context of proceedings involving a pervasive pattern of unfair labour practices, including violations of what are now sections 15, 64, 66, 67, and 70 of the Act. In doing so the Board wrote:

We have decided against awarding the Complainant its legal costs in this matter. The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successfully defend against complaints may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time.

Since then, the Board has been asked on a number of occasions to review and alter that policy (see, for example, *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401; *Omstead Foods Limited*, [1986] OLRB Rep. Aug. 1120; *Jean Liebman*, [1986] OLRB Rep. June 753; *Luciano D'Alessandro*, [1985] OLRB Rep. Dec. 1708; *Gerald Lecuyer*, [1985] OLRB Rep. July 1099 and [1987] OLRB Rep. April 529; *John Glykis*, [1985] OLRB Rep. March 420; and *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755. On each such occasion, the Board has declined to do so on the basis of labour relations policy considerations, including those articulated as follows in *Silkknit Limited*, [1983] OLRB Rep. Nov. 1913:

8. We are not entirely unsympathetic to the complainant's concern, for we recognize that a party may well have to expend substantial sums in connection with proceedings under the *Labour Relations Act*. Moreover, there is something to be said for the argument that if one can obtain costs upon the vindication of private law rights, the measure of compensation for the successful assertion of public rights guaranteed by statute should be no less generous. However, there are a number of difficulties with this superficially attractive proposition. In the first place, costs are not dealt with explicitly in the statute, with the result that it is arguable that the Board has no jurisdiction to award costs except as a part of the compensation award flowing from a finding of a statutory violation. Thus, there may be no authority to compensate a party respondent which has successfully resisted or defended against a claim. And how should one deal with a situation in which, from a practical or legal stand point, success is divided? The law of costs in the civil process is both technical and complex, and there are good policy reasons why it should not be readily imported into a law of collective bargaining which has survived without it for forty years and which the laymen who operate within the system and regularly appear before the Board have some difficulty understanding as it is. Finally, while it is tempting to suggest that flagrant or egregious violations of the statute should result in a "make whole" remedy in which the aggrieved party is compensated for the costs of the proceeding, it is much less clear how one

would distinguish an "ordinary" violation of the statute from a "flagrant" one or a frivolous assertion from one which is arguable but ultimately rejected. It is one thing to suggest that a serious breach of the *Labour Relations Act* may trigger special remedial considerations or call for ingenuity in fashioning the appropriate remedy; it is quite another to suggest that an "ordinary" breach of the Act yields one level of compensation while a "serious" one warrants a higher level of compensation. Such an approach would begin to look "penal" rather than "compensatory" (and see sections 96 - 99 of the Act which are expressly penal in character).

We respectfully agree with that reasoning, and having carefully considered the submissions of counsel concerning this matter, we are not persuaded that in the circumstances of the instant case we should depart from the Board's well-established practice of declining to award legal costs.

24. There is also a dispute between the Union and the Company concerning whether the Union should be compensated for the remuneration paid to Doug Grey (the President of Local 91) and Joe Bigeau (the Vice-President of Local 91 and an International Organizer assigned to that local) during the time they spent at negotiation sessions with the respondent, and at Board hearings in relation to these three complaints, the Union's application under section 40a for a direction that a first collective agreement be settled by arbitration (File No. 0819-86-FC), and the subsequent arbitration of the collective agreement (File No. 1223-86-FCA). It is the position of counsel for the complainants that those salary expenses are Union losses resulting from the respondent's unlawful acts and omissions. The Union also seeks compensation equal to the salary, transportation, and accommodation expenses incurred in having Richard Weatherdon, an I.T.U. International Representative, in attendance at some of the bargaining sessions. The respondent opposes all of those payments. It is the respondent's position that there was not an inordinate number of negotiating sessions, and that some negotiating progress was made at them. The respondent further contends that the salary paid to Union officials for time spent at Board hearings is one of the Union's costs of doing business, and should not be a head of damages. In this regard, counsel for the respondent also notes that the proceedings culminated in a collective agreement arbitrated by the Board pursuant to a legislative provision which was not available in previous cases.

25. We are of the view that salaries paid to Union officials while in attendance at Board hearings are analogous to legal fees incurred in respect of such proceedings, and that the reasons set forth above for denying the reimbursement of legal fees are equally applicable to such salary expenses. The same is true of salaries paid to Union officials and Union clerical staff for the time which they devoted to assembling materials for use in these proceedings and in the first contract arbitration proceedings. Negotiating costs, on the other hand, may be compensable in some circumstances (see, for example, part (d) of the order contained in paragraph 125 of *Radio Shack*, [1979] OLRB Rep. Dec. 1220). In the instant case, some of the time spent at the negotiation sessions was wasted in dealing with proposals for which the respondent had no plausible business justification and in relation to which the respondent was engaging in "surface bargaining" (see paragraph 115 of the Decision for examples of such proposals). Other time was wasted discussing relatively trivial matters which would likely have been quickly resolved if the respondent had been bargaining in good faith and making every reasonable effort to make a collective agreement. However, some time was also wasted due to the lateness, non-availability, or lack of preparedness of Union representatives (see, for example, paragraphs 56, 82, and 110 of the Decision). Moreover, many of the provisions ultimately included in the arbitrated collective agreement (in accordance with section 40a(17) of the Act) were agreed upon through bargaining which occurred at the negotiation sessions. Having regard to all of the circumstances, we have concluded that the respondent must compensate the Union for half of the reasonable negotiating expenses incurred by the Union in respect of collective bargaining with the respondent, including half of the salaries paid to Messrs. Grey, Bigeau, and Weatherdon in respect of time spent at bargaining sessions.

26. The parties are in agreement that reasonable expenses which would not have been incurred by the Union but for the unlawful lock-out (such as long distance telephone and courier costs pertaining to lock-out pay, the salary and benefits of the extra office worker hired by the Union to administer lock-out pay, the costs of renting sanitation facilities, hall rental expenses, and reasonable incidental food costs) are compensable under the Direction. They are in disagreement, however, as to whether the Union is entitled to be reimbursed for costs incurred in producing materials such as stickers, leaflets, letterhead, labels, and buttons regarding the lock-out and the boycott campaign mounted against the respondent by the Union in an effort to hold the bargaining unit together and to dissuade the respondent from continuing the lock-out. In *Grey-Owen Sound Health Unit*, [1980] OLRB Rep. Feb. 223, at paragraph 27, the Board found printing costs and other expenses associated with the public campaign mounted by the Ontario Nurses' Association during a lock-out (which contravened what is now section 15 of the Act) to be "too remote" to be compensable, as they were "more related to the union's desire to maintain a favourable image than an attempt to keep the unit together in face of employer unfair practices". In that case, one of the union's purposes in embarking upon that campaign was to "make it clear that the trade union was not responsible for the work stoppage". In the instant case which, unlike *Grey-Owen Sound*, involved a pervasive pattern of unfair labour practices (see paragraph 121 of the Decision), including a lengthy unlawful lock-out intended "to punish employees for having exercised their rights to join a union and engage in collective bargaining, and to dissuade them from continuing to exercise those rights" (see paragraph 119 of the Decision), the evidence adduced before us indicates that the boycott campaign, picketing, and other activities promoted by the Union in respect of the respondent's unlawful lock-out of bargaining unit employees *were* intended to keep the unit together in face of the respondent's unfair labour practices, and to mitigate the losses suffered by employees and the Union as a result of that unlawful lock-out by attempting to bring it to a swift conclusion. Accordingly, we are satisfied that, in the circumstances of this case, the Union is entitled to be reimbursed by the respondent for reasonable costs incurred in producing materials such as stickers, leaflets, letterhead, labels, and buttons regarding the lock-out and the boycott campaign mounted by the Union.

27. The parties are also divided on the issue of mitigation. Counsel for the complainants contends that employees who are unlawfully locked out by their employer are not required to seek alternate employment. She argues that they may legitimately concentrate their energies on picketing the employer and promoting a boycott of the employer, as those activities are themselves a form of mitigation designed to end the lock-out. She further submits that the earnings of employees who do obtain alternate employment should not be taken into account in determining the amount of compensation payable to them by the respondent. It is the position of respondent's counsel that employees who are locked out in violation of the Act do have a duty to mitigate their loss by seeking alternate employment. He acknowledges that the obligation to seek alternate employment does not arise at the very beginning of the lock-out, but submits that after two or three months a reasonable employee would realize that he is involved in a long term situation and would attempt to minimize his loss by seeking other work. It is the respondent's position that extra income earned by an employee's spouse during the lock-out should also be taken into account in quantifying the employee's loss. He also suggests that any compensation payable to the Union in respect of lock-out pay should be reduced by the amount of lock-out pay paid to employees who were not making reasonable efforts to find alternate employment after the two or three-month period. In this regard, it is his position that the Union was required to mitigate its loss by ceasing to provide lock-out pay to such employees.

28. It is well established in the Board's jurisprudence that a grievor who suffers an interruption in earnings as a result of an unfair labour practice discharge must take reasonable steps to mitigate his loss: see, for example, *Wilco-Canada Inc.*, [1983] OLRB Rep. June 989; *Fotomat Can-*

*ada Limited*, [1982] OLRB Rep. July 1020; and *Sutton Place Hotel*, [1980] OLRB Rep. Aug. 1250. Indeed, in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at paragraph 96, the Board suggested that dispensing with an obligation to mitigate losses would introduce a punitive element into a compensation order under section 89. Having carefully considered the able submissions of counsel, we have concluded that employees who are unlawfully locked out by their employer are obliged to take reasonable mitigatory action. However, as noted in *Wilco-Canada Inc.*, *supra*, at page 1006, “[w]hether or not a grievor has taken reasonable steps to attempt to mitigate his loss is a question of fact dependent on the particular circumstances of each case”. As indicated above, it is not disputed that during the initial period of the lock-out, an employee could reasonably refrain from seeking alternate employment on the basis that the lock-out would likely come to an end in the near future. However, by mid August the continued lack of progress in negotiations in the context of a lock-out which had continued for over three months would have rendered it unreasonable for an employee to continue to hold that view. By then, an employee could reasonably be expected to take steps to avoid or reduce further losses. The duty to mitigate would not, of course, require him to abandon support for the Union, nor to abandon his continuing status as an employee of the respondent: see in this regard section 1(2) of the Act, which provides that “no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as a result of a lock-out....” Thus, an employee would not be required to seek *permanent* employment elsewhere, or to seek alternate employment which, by reason of such matters as its location or work schedule, would preclude him from picketing the respondent’s premises. Moreover, an employee seeking temporary alternate employment would be entitled to advise prospective employers that he had been locked out by the respondent, that his Union was seeking to end the lock-out by various means (including proceedings before the Board) which might from time to time necessitate his absence from the work place, and that he intended to return to work for the respondent when the lock-out came to an end.

29. As indicated in our oral ruling on May 28, 1987, any earnings which employees received from other employers during the lock-out (beyond what they were earning from those other employers prior to the lock-out) must be deducted from the sum which they would otherwise have received from the respondent. To ignore those earnings in quantifying the grievors’ loss would be to place them in a better financial position than they would have been in if they had not been locked out. Under that approach, the Board’s order would cease to be merely compensatory, and would take on a punitive aspect. However, as acknowledged by counsel for the respondent, employees are entitled to be reimbursed by the respondent for reasonable expenses (such as extra travel or child care expenses) incurred in mitigating or attempting to mitigate their loss. Extra income earned by an employee’s spouse during the lock-out will not be taken into account in quantifying the employee’s loss as, in our view, such income is too remote to be legitimately considered in the context of relief under section 89 of the Act. We also find no merit in counsel for the respondent’s contention that the Union’s duty to mitigate its loss required it to cease to provide lock-out pay to employees who failed to make reasonable efforts to find alternate employment during the lock-out. Lock-out pay (or strike pay) is provided to employees in order to provide them with some funds with which to purchase the necessities of life during a lock-out (or strike). Union officials cannot reasonably be expected to make eligibility for such payments conditional on efforts by employees to find alternate employment during the strike or lock-out. Indeed, the existence of such payments is designed to minimize or at least delay the financial need to seek such employment, thereby enabling the employees to concentrate their energy on picketing and other activities intended to end the lock-out and to maintain solidarity among bargaining unit employees.

30. The Union also seeks compensation from the respondent for the lock-out pay which was provided to employees during the unlawful lock-out. Until the morning of the May 28, 1987 hearing, the only issue in dispute among the parties concerning that head of compensation was quan-

tum. In an effort to resolve that issue, on the day before the hearing complainants' counsel provided respondent's counsel with the following letter, which was written on the letterhead of the International Typographical Union (the "I.T.U.") and was entered as an exhibit at the hearing on the agreement of the parties:

January 14, 1987

President Douglas Wm. Grey  
Toronto Typographical Union No. 91  
1929 Eglinton Avenue, West  
Toronto, ON, Canada  
M6E 2J7

Dear President Grey:

This will acknowledge receipt of your letter dated January 5, 1987 requesting the total amount of strike benefits paid to members of Burlington Northern Air Freight.

As requested, attached you will find a list of total ITU payments made to members of the Burlington Northern Air Freight through December 31, 1986.

With kind regards, I am

Fraternally yours,

(signed) Thomas W. Kopeck  
Secretary-Treasurer

The sheet attached to that letter lists amounts received by thirty persons, totalling \$213,555.30.

31. At the May 28 hearing, Company counsel advised the Board and complainants' counsel that after further reviewing Mr. Kopeck's letter, he felt obliged to argue on behalf of his client that Local 91, and the employees represented by it, did not have a compensable loss in respect of lock-out pay, because the lock-out pay came from the I.T.U. rather than from Local 91. As noted above, on the agreement of the parties, complainants' counsel was permitted to submit written argument pertaining to the respondent's liability in respect of lock-out pay. (That argument was initially to be submitted on or before June 11, but that deadline was subsequently extended by the Board to June 22, on the agreement of the parties.) We find no merit in Company counsel's contention that complainants' counsel is estopped from making some of the arguments contained in the written submissions which were filed pursuant to that arrangement. As further noted above, on the agreement of the parties, counsel for the respondent was permitted to file written reply argument concerning his client's liability in respect of lock-out pay. (That written reply argument was initially to be filed by June 25, but that deadline was extended by the Board to July 13, on the agreement of the parties.) The written submissions filed by respondent's counsel contain a detailed response to all of the arguments raised by complainants' counsel. We do not propose to reproduce or summarise the written submissions filed by counsel. It is sufficient for purposes of this decision to indicate that, having carefully considered all of the oral and written submissions of the parties concerning this aspect of the case, we have reached the conclusions set forth below.

32. As indicated above, lock-out pay (or strike pay) is provided to employees in order to provide them with some funds with which to purchase the necessities of life during a lock-out (or strike). In the case of the I.T.U., the strike/lock-out fund from which such payments are paid is financed by means of a surcharge on each member's dues. As contended by respondent's counsel (in his submissions regarding mitigation), in the instant case eligibility for lock-out pay was not contingent upon participation in picketing. Thus, lock-out pay was not paid as compensation for

picketing. The lock-out pay received by employees from the I.T.U. during the course of the unlawful lock-out was a collateral benefit and, accordingly, is not deductible from the compensation payable by the respondent to its employees for wage losses suffered during the unlawful lock-out: see, generally, *Carter of California Inc.*, 1980 CCH NLRB ¶17,165; *Sioux Falls Stock Yards Company*, 1978 CCH NLRB ¶19,407; *Florence Printing Company v. N.L.R.B.*, 376 F.2d 216 (1967); and *N.L.R.B. v. Rice Lake Creamery Company*, 365 F.2d 888 (1966). This will not result in making any of the employees "more than whole", as upon receiving compensation for lost wages from the respondent they will be required by section 11 of the I.T.U.'s *Book of Laws* to reimburse the I.T.U. in an amount equal to the benefits received from the I.T.U. during the lock-out. As submitted by counsel for the respondent, in *Academy of Medicine, supra*, and *Securicor Investigation and Security Ltd.*, [1983] OLRB Rep. May 720, the Board directed that strike pay (or a portion thereof) be deducted from the compensation payable to the employees. However, in each of those cases, the Board also directed the employer to reimburse the complainant unions for their strike expenses, including strike pay (or a portion thereof). Moreover, there is nothing in those decisions which indicates that the issue of whether strike or lock-out benefits could, at least in some circumstances, be non-deductible collateral benefits was argued or decided. Complainants' counsel did argue that issue in the instant case, and referred the Board to a substantial body of American jurisprudence which supports that conclusion where, as in the instant case, the benefits are not paid as compensation for picketing. We respectfully agree with and adopt that approach in the circumstances of this case.

33. In view of the foregoing conclusion, it is unnecessary to determine whether or not the I.T.U. and Local 91 should be considered as separate entities for purposes of this case. It is also unnecessary to deal with the complainants' request (contained in the aforementioned written submissions of their counsel) that the I.T.U. be added as a party.

34. As noted above, the parties have requested the appointment of a Board Officer. We are prepared to grant that request, in the hope that with assistance of this decision and a Board Officer, the parties will be able to resolve their differences and conclude this protracted litigation. Accordingly, a Board Officer is hereby authorized to meet with the parties to endeavour to resolve the matters remaining in dispute and failing such resolution, is further authorized, pursuant to section 103(2)(g) of the Act, to exercise the powers listed in section 103(2)(a), (b), and (c), for the purpose of inquiring into and reporting to the Board concerning the factual issues remaining in dispute regarding the quantification of the Board's Determination dated December 19, 1986, including:

- (1) the date in November of 1984 on which the employees would have received their annual pay increase, on the basis of the pattern established in 1982 and 1983;
- (2) the amount of profit-sharing bonus which would have been paid to employees by the respondent prior to the end of 1984;
- (3) the losses incurred as a result of the respondent's contravention of section 15 of the Act, including loss of an opportunity to negotiate a collective agreement before October 1, 1986 (as delineated in paragraph 9 of this decision);
- (4) the amount of Union dues and special assessments which would have been deducted by the respondent from bargaining unit employees' wages and remitted to the Union in respect of the period from May

8, 1985 to October 1, 1986, if there had been a collective agreement in force during that period;

- (5) the average of the wage increases which were given by the respondent to probationary employees upon successful completion of their respective probationary periods in 1984;
- (6) the amount which would have been paid by the respondent to Unitog Canada Ltd. for supplying and cleaning uniforms up to May 8, 1985 for employees who, following the certification of the Union, were not provided with uniforms upon successful completion of their respective probationary periods;
- (7) the wage and benefit losses sustained by Robert Miller, Dan Poutsoungas, Dale Robertson, Rick Best, and D. J. Simec, as a result of the respondent's unlawful acts described in paragraphs 25, 26, 27, 34, 35, 64, and 65 of our Decision (dated December 19, 1985);
- (8) the wage and benefit losses sustained by Dan Poutsoungas as a result of his termination by the respondent;
- (9) the median employee vacation period date for 1984, and the interest payable to each employee (who did not receive his vacation pay until April of 1986) for the period between the date which is one year later than that date and the date in April of 1986 on which he received his vacation pay;
- (10) the losses incurred by employees in respect of Canada Savings Bonds (as delineated in paragraph 19 of this decision);
- (11) the negotiating expenses incurred by the Union in respect of collective bargaining with the respondent, including salaries paid to Messrs. Grey, Bigeau, and Weatherdon in respect of time spent at bargaining sessions;
- (12) the expenses incurred by the Union as a result of the unlawful lock-out, including long distance telephone and courier costs pertaining to lock-out pay, the salary and benefits of the extra office worker hired by the Union to administer lock-out pay, the cost of renting sanitation facilities, hall rental expenses, incidental food costs, and costs incurred in producing materials such as stickers, leaflets, letterheads, labels, and buttons regarding the lock-out and the boycott mounted against the respondent by the Union;
- (13) the amount of remuneration which, but for the unlawful lock-out, would have been paid to employees by the respondent between May 8, 1985 and the date(s) on which they returned to work in July of 1986;
- (14) the amount of earnings which individual employees received from other employers during the lock-out (beyond what they were earning from those other employers prior to the lock-out);

- (15) the amount of expenses incurred by individual employees in mitigating or attempting to mitigate their losses; and
  - (16) the amount of interest payable by the respondent, pursuant to part 8 of our Direction dated December 19, 1986 (and in accordance with the rulings contained in the instant decision).
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**1923-86-M The Electrical Power Systems Construction Association, Applicant v. International Association of Bridge, Structural and Ornamental Iron Workers, Respondent**

**Construction Industry Grievance - Timeliness - Whether applicant employer can recover an alleged improper overpayment, as against an individual employee, through a grievance formally against a trade union but specifying the individual concerned - Application dismissed for delay - Pursuit of redress in another forum not constituting reasonable grounds for delay in filing a complaint with the Board**

**BEFORE:** *S. A. Tacon*, Vice-Chair, and Board Members *J. Murray* and *P. V. Grasso*.

**APPEARANCES:** *Harvey Beresford*, *Robert Atkinson*, *Ivar Starasts* and *David McKee* for the applicant; *Bernard Fishbein*, *James Phair*, *Michael Zimmerman* and *Brian Fleming* for the respondent.

**DECISION OF THE BOARD;** August 25, 1987

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*. The applicant seeks to recover approximately \$14,000 from a former employee, Brian Fleming, paid in respect of room and board allowance under article 26 of the relevant collective agreements. The applicant asserts these monies were paid as a result of an allegedly inaccurate declaration by Fleming as to his regular residence.

2. The respondent trade union raised two preliminary objections, namely, that the applicant employer cannot recover monies from an individual through the respondent trade union as party to a grievance and that the grievance should be dismissed as untimely in any event. The parties agreed, and the Board concurred, that it was appropriate first to rule on the preliminary objections. Thus, the Board heard evidence and submissions solely with respect to those two preliminary issues.

3. In the above context, the parties submitted the following agreed statement of facts:

STATEMENT OF FACTS

1. The Applicant and the Respondent have been parties to successive collective agreements detailed in paragraph 1 of Appendix "A" to the Applicant's Referral under section 124 of the *Labour Relations Act*.

2. On or about May 27, 1981, Brian Fleming commenced employment as an ironworker-welder at the Bruce Nuclear Power Generating Project. During the term of Mr. Fleming's employment, his terms and conditions of employment were covered by the provisions of the collective agreements entered into by the Applicant and the Respondent.

3. On or about May 27, 1981, Brian Fleming applied for a room and board allowance under Article 26 of the 1978 Collective Agreement, declaring that his regular residence was 30 Regent Street, Unit 47, Hamilton, Ontario. (Exhibit 1 is a copy of this application dated May 27, 1981).
4. During the term of his employment until on or about May 4, 1983, Mr. Fleming received a room and board allowance based on the declaration referred to in paragraph 3.
5. During the winter of 1983, the Ontario Provincial Police conducted a criminal investigation which led to the laying of charges against Mr. Fleming under the federal *Narcotics Control Act*.
6. As a result of these charges and Mr. Fleming's inability to attend work, Mr. Fleming was dismissed from his employment on May 4, 1983 for cause.
7. Information supplied by the Ontario Provincial Police to representatives of the Applicant shortly after May 4, 1983, indicated a possible discrepancy between Mr. Fleming's address and the address referred to in paragraph 3. Representatives of the Applicant believed that Mr. Fleming may have improperly received room and board allowance since May 27, 1981.
8. The Applicant had in the past been faced with other cases of a subsequent discovery of alleged improper receipt of room and board allowance by former employees. The applicant's practice in such situations was to turn the matter over to the police for full investigation and prosecution of criminal violations and, following the outcome of the police investigations, to then take action in the courts if necessary to retrieve the improperly received room and board allowance.
9. In accordance with this practice, the matter of Mr. Fleming's room and board allowance claim was turned over to officials of the Kincardine Detachment of the Ontario Provincial Police in May, 1983.
10. As a result of the subsequent O.P.P. investigation, an information was laid on September 5, 1983, charging Mr. Fleming with fraud under section 338(1) of the *Criminal Code* in connection with the room and board allowance claim.  
(Exhibit 2 is a certified true copy of the information).
11. The information was ultimately withdrawn at the request of the Crown on October 15, 1984.  
(See Exhibit 2).
12. In early November, 1984, Corporal James Renwick of the Kincardine detachment of the O.P.P. met with Mr. Rick Saltes, Personnel Officer at the Bruce Generating Plant, to give Mr. Saltes the factual details of the investigation carried out by the O.P.P. in connection with Mr. Fleming's room and board allowance claim.
13. Following receipt of this information, the Applicant decided to attempt to contact Mr. Fleming to demand repayment of the room and board allowance.
14. Attempts were made by the Applicant to locate Mr. Fleming's then current address. By mid-December, 1984, the Applicant obtained information that Mr. Fleming's address was 142 Duke Street, Apartment 9, Hamilton, Ontario.  
(Exhibit 3 is a Security Investigation Report dated December 14, 1984).
15. Letters dated January 3, 1985 and January 22, 1985, were sent to Mr. Fleming at the Duke Street address requesting repayment of the room and board allowance.  
(Exhibit 4 is a letter from Mr. Saltes to Mr. Fleming dated January 3, 1985. Exhibit 5 is a registered letter from Mr. Mark, Project Accountant, to Mr. Fleming dated January 22, 1985).
16. When no response was received, Ontario Hydro's internal solicitors were requested, by letter dated February 1, 1985, to commence civil action to recover monies paid to Mr. Fleming in respect of the room and board allowance.  
(Exhibit 6 is a copy of a letter dated February 1, 1985, from Mr. Mark to Mr. E.R. Finn, Hydro solicitor).

17. A Statement of Claim was issued by Ontario Hydro against Mr. Fleming in the District Court of Ontario on February 28, 1985.  
(Exhibit 7 is a copy of the Statement of Claim).

18. Mr. Fleming appeared by his solicitors, Koskie and Minsky, and brought a motion to the District Court of Ontario for an Order dismissing the claim.  
(Exhibit 8 is a copy of Mr. Fleming's Notice of Motion dated April 10, 1985).

By Order dated May 21, 1985, the Honourable Judge Matlow dismissed the motion.  
(Exhibit 9 is a copy of the Order of Judge Matlow dated May 21, 1985 and Exhibit 10 is a copy of His Honour's reasons for decision).

19. By notice dated May 27, 1985, Mr. Fleming appealed to a High Court Judge from the Order of Judge Matlow.  
(Exhibit 11 is a copy of the Notice of Appeal dated May 27, 1985).

20. By order dated August 15, 1985, the Honourable Mr. Justice O'Brien allowed the appeal and dismissed the action brought by Ontario Hydro.  
(Exhibit 12 is a copy of the Order of Mr. Justice O'Brien and Exhibit 13 is a copy of His Lordship's reasons for decision).

21. By notice dated August 29, 1985, Ontario Hydro appealed to the Divisional Court from the Order of Mr. Justice O'Brien.  
(Exhibit 14 is a copy of the Notice of Appeal).

22. The appeal was heard on March 7, 1986 and by order dated March 13, 1986, the Divisional Court dismissed the appeal.  
(Exhibit 15 is a copy of the Order of the Divisional Court and Exhibit 16 is a copy of the Court's reasons for decision).

23. By notice dated March 25, 1986, Ontario Hydro applied to the Ontario Court of Appeal for Leave to Appeal the decision of the Divisional Court.  
(Exhibit 17 is a copy of Ontario Hydro's Notice of Motion for Leave to Appeal the decision of the Divisional Court).

24. By Order dated April 28, 1986, Leave to Appeal was refused by the Ontario Court of Appeal.  
(Exhibit 18 is a copy of the Order of the Ontario Court of Appeal).

25. The within grievance was commenced on June 24, 1986.  
[The exhibits referred to are not reproduced herein.]

4. By way of amplification of paragraph 8 of the agreed statement of facts, applicant's counsel stated that a variety of means for pursuing overpayments had been utilized where the individuals in question remained employees. For example, on occasion, "current" employees had been prosecuted where payments were made because of the allegedly fraudulent statements by those employees or recovery sought through the grievance and arbitration process under the collective agreement. In some instances, individuals were terminated for such misconduct and, subsequently, recovery of monies was sought through the courts. With respect to "former" employees, however, the applicant had never utilized the grievance and arbitration procedures in the collective agreement to seek to recover such payments. In the instant case, the applicant did not file a grievance, because, in its view, Fleming was no longer an employee when the alleged misconduct was discovered and, thus, the appropriate route for redress lay through the courts.

5. Also by way of amplification, respondent's counsel agreed that the applicant had utilized a variety of means to recover monies allegedly wrongly paid to employees as set out in the preceding paragraph. Counsel added that the respondent view the entire question of the "recovery" of such monies, including the route followed to enforce repayment, as controversial.

6. The Board next sets out the able and thorough submissions of counsel with respect to the preliminary issues.

7. With respect to the first preliminary argument, counsel for the respondent asserted that the applicant had not alleged that the union had violated the collective agreement nor claimed relief against that party. Thus, as Fleming was not a party to (although admittedly bound by) the collective agreement and no misconduct or relief was alleged or claimed against the actual party to the collective agreement, counsel contended the grievance must be dismissed. In essence, counsel argued that the applicant could not utilize the grievance and arbitration process to recover monies allegedly improperly paid out to individuals. Counsel referred to the following cases in support: *Re Metropolitan Toronto Apartment Builders Association* (1972), 1 LAC (2d) 201 (H.D. Brown); *J.G. Rivard Limited*, [1976] OLRB Rep. Sept. 540 (Rivard #1); *J.G. Rivard Limited*, [1980] OLRB Rep. July 1009 (Rivard #2); *The Electrical Power Systems Construction Association*, [1976] OLRB Rep. Dec. 825; *Ainsworth Electric Co. Limited*, [1977] OLRB Rep. July 399; *Ontario Hydro*, [1986] OLRB Rep. Aug. 1137; *Fred Farkas et al and Heist Industrial Services* (1963), 63 CLLC ¶16,263; *Ontario Hydro*, [1985] OLRB Rep. Apr. 582; *Eastern Sheet Metal and Mechanical Contractors*, [1981] OLRB Rep. Jan. 26; *Re Ontario Produce Co., Oshawa Foods Division of Oshawa Group Ltd.* (1986), 26 LAC (3d) 159 (O'Shea); *Ontario Hydro*, [1985] OLRB Rep. June 896.

Counsel submitted, in connection with Rivard #2, that section 50 does not parallel section 147(1) of the Act and, moreover, section 50 has been held to be a declaratory rather than substantive provision. Even if section 50 could be regarded as substantive, counsel asserted that, following *Eastern Sheet Metal*, *supra*, it was now too late to "convert" a section 124 application to a 89 complaint. It is useful here to note that applicant's counsel clarified that the applicant was not arguing that section 50 was a substantive provision.

8. As to the second preliminary objection, respondent's counsel contended that article 34.5 established a mandatory time limit of thirty days for the filing of a grievance by the employer. From whatever point that thirty day period was measured, from the date Fleming's affidavit was filed on April 7, 1985, to refusal of leave to appeal by the Ontario Court of Appeal on April 28, 1986, it was submitted that thirty day period was exceeded. Moreover, counsel stressed that the "wrong guess" as to the appropriate forum for recovery did not cure the delay. A number of cases wherein the Board dealt with the issue of timeliness were cited in support: *The Lummus Company Canada Limited*, [1976] OLRB Rep. Jan. 980; *Ontario Hydro*, [1987] OLRB Rep. Apr. 574; *Sinclair Welding Limited*, [1981] OLRB Rep. Dec. 1822; *Ontario Hydro-Darlington G.S.*, [1986] OLRB Rep. July 1014; *Sheller-Globe of Canada, Ltd.*, [1982] OLRB Rep. Jan. 113 upheld (1983), 42 O.R. (2d) 73 (Ont. Div. Ct.); *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420; *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446; *Catherine Whittaker*, [1985] OLRB Rep. Apr. 621. Counsel then submitted that, while section 44(6) of the Act permitted an extension of the time limits provided in collective agreements, there had been no reasonable grounds given for such an extension in the instant case. It was reiterated that the initial selection of the wrong forum was not sufficient. Absent reasonable grounds for the extension, it was asserted the issue of prejudice to the respondent need not be considered. In the alternative, counsel emphasized the general prejudice flowing from the prospect of having to litigate a grievance on the merits after the passage of such a long time. Further, the respondent was not privy to some documentation (e.g. police reports) and the factual background to the case was complex in light of the definition of "regular residence" in the collective agreement. Finally, counsel urged the Board to conclude that any apparent unfairness in refusing to hear the merits was not unusual and must be placed in the context that the delay in filing was within the control of the applicant. Cases referred to in connection with section 44(6) included: *Re Pamour Porcupine Mines Ltd. (Schumacher Division)* (1976), 12 LAC (2d) 122 (Dunn); *Re Tend-R-Fresh Plant, United Co-operatives of*

*Ontario* (1983), 13 LAC (3d) 90 (H.D. Brown); *Re Corporation of the City of Toronto* (1977), 16 LAC (2d) 123 (Abbott).

9. Counsel for the applicant stressed that the applicant was seeking the recovery of monies wrongly paid out rather than damages or other penalty. That Fleming was not a party to the collective agreement was irrelevant, it was submitted, given that he was bound by that collective agreement. To deny arbitration to recover funds wrongly paid out on this distinction would insulate employees from relief for breaches of the document to which they, by statute, must adhere. Counsel cited common situations where a union was seeking redress from an employer on behalf of an individual grievor and where a union was seeking relief from an employer through that employer's bargaining agency as comparable analogies which illustrated the irrelevancy of the "party to/bound by" distinction. It was also emphasized that the collective agreement itself, in article 34.5, provided for the filing of policy or specific grievances by the employer and the latter term could only signify grievances against individuals. While counsel conceded that section 50 of the Act was not an "offence" section, he argued that the statutory remedial authority of an arbitrator extends beyond declarations to binding awards as against individual employees. That Fleming was no longer an employee when the applicant learned of the alleged overpayment should not eliminate the applicant's right of recovery through an arbitral determination as to the quantum due and enforcement through the courts if necessary. Counsel contended that section 124 of the Act required the referral of grievances by a party and against a party but that section did not restrict relief to a party to the collective agreement. Counsel also noted that reciprocity of rights and obligations under collective agreements supported the applicant's assertion that the employer could be granted relief against an individual employee through his/her bargaining agent just as an individual employee could gain redress against his/her employer through that bargaining agent. Cases referred to in support on this aspect include: *Re Bennett & Wright Contractors Ltd.* (1969), 20 LAC 187 (Godin); *Re H. Fine & Sons Ltd.* (1984), 15 LAC (3d) 236 (Roach); *Standard Coil Products (Canada) Ltd.* (1971) 22 LAC 377 (P.C. Weiler); *Canadian Admiral Corp.* (1967), 19 LAC 1 (Arrell); *Re St. Joseph's Hospital, London* (1985), 20 LAC (3d) 390 (Kates); *Ontario Hydro*, [1983] OLRB Rep. Sept. 1547; *Hamilton Street Railway Co. v. Northcott* (1966), 66 CLLC ¶14,157 (SCC); *Re Samuel Cooper & Co. Ltd.* (1973), 35 DLR (3d) 501 (Ont. Div. Ct.)

10. With respect to the issue of timeliness, counsel reiterated that the situation was novel, that neither arbitral jurisprudence nor the courts had previously recognized that the arbitral route should be followed where the employer had no knowledge of the circumstances giving rise to the grievance until after the employment relationship was severed. It was argued that the applicant had acted diligently throughout to recover the monies at issue and Fleming could have no doubt that he was being pursued for repayment. Essentially, counsel submitted the novelty of the instant case constituted reasonable grounds for an extension of the time limits in the collective agreement pursuant to the Board's authority in section 44(6) of the Act and Fleming should not be permitted to hide behind a procedural defect in the totality of the circumstances. Counsel also pointed to the six year limitation period at common law for contractual claims as a relevant factor in determining whether the time limits should be extended. Moreover, counsel submitted there was no evidence that the respondent would be prejudiced by a hearing on the merits at this juncture, let alone the "substantial" prejudice required in section 44(6). Again, it was argued Fleming could not claim surprise that the employer was pressing for recovery of the alleged overpayment. Indeed, absent evidence of actual prejudice, prejudice could not be presumed to flow from the delay in filing the grievance as the merits of the case would have been prepared or reviewed when the claim was filed. Counsel contended the caselaw with respect to timeliness under section 89 of the Act was not useful given the absence of a section comparable to section 44(6). In *Ontario Hydro*, [1987] OLRB Rep. Apr. 547, counsel noted that the Board had construed section 44(10) liberally to permit recovery under earlier collective agreements and, in paragraph 35 of that decision, had indicated

that recovery was limited to the period specified because of a reliance interest. It was argued that concept was not applicable to the instant case of alleged unjust enrichment. In conclusion, counsel submitted that the test in section 44(6) of the Act was satisfied and, thus, notwithstanding its acknowledgment that the time limits in article 34.5 of the collective agreement were mandatory, the time limit should be extended so as to permit an adjudication of the merits. Cases cited in support were: *Re Algoma Contractors Ltd.* (1980), 25 LAC (2d) 292 (Hinnegan); *Re Becker Milk Company Ltd.* (1978), 19 LAC (2d) 217 (Burkett); *Re Queensway General Hospital* (1984), 17 LAC (3d) 9 (Swan); *Re Greater Niagara General Hospital* (1981), 1 LAC (3d) 1 (Schiff).

11. In reply, respondent's counsel disputed the novelty of the situation, asserting that courts regularly refused to entertain claims involving an interpretation of a collective agreement. Rather, counsel submitted it was a recognized route for a party to obtain a declaration at arbitration as to the contract interpretation and then enforce recovery of monies through the courts. Counsel reiterated his view that no reasonable explanation for the delay had been given and disputed that the employer had acted diligently. It was argued that the Board jurisprudence regarding timeliness was applicable as the considerations going to the exercise of the Board's discretion under section 89 to refuse to entertain a complaint were not unlike the test for arbitral extension of time limits in section 44(6). Finally, counsel asserted the reference to a "specific grievance" in article 34.5 of the collective agreement need not necessarily refer to a claim against an individual employee but could mean a specific incident (e.g., a particular walkout) alleging misconduct by the union.

12. Given the Board's conclusion with respect to the second preliminary objection, the Board does not consider it appropriate to reach a determination as to whether the applicant can recover damages or, specifically in this instance, an alleged improper overpayment, as against an individual employee through a grievance formally against a trade union but specifying the individual concerned. That is, the Board intends to consider the second preliminary objection, that the grievance should be dismissed as untimely, on the assumption, but without deciding, that the respondent fails on its first preliminary objection. The issue as to whether a section 89 complaint or grievance should be heard on the merits notwithstanding a delay in initiating the process is not new. The Board has a discretion in section 89 of the Act to refuse to entertain a complaint because of delay. That discretion is not exercised in a mechanical fashion but it is well recognized that labour relations policy reasons may militate against an adjudication of a complaint on the merits, rather than the delay merely going to the question of the appropriate remedy: *Sheller-Globe, supra*; *Corporation of the City of Mississauga, supra*. In the arbitral forum, as well, there is a statutory discretion in section 44(6) of the Act to relieve against time limits in a collective agreement provided there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced thereby. The more recent arbitral jurisprudence focuses on a number of factors in determining whether the arbitrator's discretion should be exercised under section 44(6) including, the nature of the grievance, the length of the delay, the reason for the delay, the stage in the process at which the delay occurred, whether the grieving party was responsible for the delay or acted with due diligence and, of course, whether the opposite party would be prejudiced by an adjudication on the merits: *Re Greater Niagara General Hospital, supra*, including the cases cited therein; *Re Becker Milk Company, supra*. Again, the exercise is not mechanical but an assessment of the factors in the context of the specific circumstances of each grievance. It must also be emphasized that section 44(6) was enacted to enable arbitrators to resolve the actual grievance between the parties, to avoid the dismissal of a grievance solely on technical grounds. This statutory authority was predicated on the premise that the parties' collective bargaining relationship was better served by adjudication of the merits of disputes.

13. Section 124 of the Act provides an alternative route to arbitration for the construction industry. In hearing such grievances, the Board has the authority of an arbitration panel, including

the discretion in section 44(6) of the Act to relieve against time limits. While the arbitral jurisprudence on the exercise of that discretion, therefore, is relevant, the Board must also be sensitive to the statutory purpose of section 124, namely, to provide an extraordinarily expeditious mechanism for adjudicating grievances in the construction industry: see, for example, *The Lummus Company, supra*. Not only may the grievance and arbitration process in the collective agreement be bypassed but, in accordance with section 124(2), the hearing shall be convened within fourteen days after receipt of the application.

14. In the instant case, the applicant learned of the alleged overpayment in May 1983 following Fleming's dismissal from his employment. Criminal charges for fraud were laid in September 1983 and subsequently withdrawn in October 1984. In November 1984, the applicant was aware of the factual details of the police investigation. Following unsuccessful attempts to contact Fleming by mail, a civil action was commenced in February 1985. In May 1985, a motion seeking to strike the employer's claim was dismissed. That decision was reversed on appeal, that is, in August 1985, the employer's action was dismissed. The employer's appeal to the Divisional Court was dismissed in March 1986. Following the refusal of leave to appeal to the Ontario Court of Appeal on April 28, 1986, the grievance was filed on June 24, 1986. The employer now seeks an adjudication on the merits as to whether Fleming violated the collective agreement and should reimburse the employer for approximately \$14,000 in respect of room and board allowance paid out for the period May 27, 1981 to May 4, 1983.

15. In the Board's view, the delay in this case is considerable and not justified. It is accurate to state that the applicant exercised due diligence with respect to pursuing its claims in the courts and that, throughout, Fleming was aware that the applicant was seeking recovery of the alleged overpayment. Further, there may well have been reasonable grounds for extending the time limits in the collective agreement, given the circumstances, had the grievance been filed in October 1984 when the criminal charges were dropped or even in August 1985 following the dismissal of the applicant's civil action. The Board is not indicating that such would have been its decision as the delay was considerable even at those points. In any event, the applicant chose to rely on its rights of appeal within the courts and only when that route was finally exhausted did the applicant seek to invoke section 124 of the Act. Indeed, the applicant waited virtually two months after leave to appeal was refused before filing the grievance. In the Board's opinion, there was no reasonable basis for delay in initiating the grievance process, at the very latest, after August 1985, when the court plainly stated its view that the matter involved the interpretation of a collective agreement and the courts were not the proper forum for that adjudication. Moreover, the applicant acted on legal advice (although not counsel of record in the instant proceedings) in restricting pursuit of its claims to the courts.

16. The Board, in section 89 complaints, has expressed the view that pursuit of redress in other forums may not constitute reasonable grounds for delay in filing a complaint with the Board: see, for example, *Sheller-Globe, supra*. The Board regards this admonition as even more compelling with respect to section 124 grievance referrals. The statutory purpose of providing an extraordinarily expeditious mechanism to resolve grievances in the construction industry, because of the nature of the construction industry itself, would be negated by an exercise of the Board's discretion in section 44(6) where a party had full knowledge of the factual basis for its claim and yet chose to exhaust what it regarded as other avenues for redress before filing a section 124 application (cf. *The Electrical Power Systems Construction Association, supra*). Notwithstanding an arbitral discretion to extend time limits so as to resolve the actual dispute between the parties, there are occasions, as in the instant case, where the benefits of an adjudication on the merits are outweighed by competing policy considerations. Thus, the Board declines to exercise its discretion under section

44(6) of the Act to extend the time limit provided in the collective agreement. There was no dispute that that limit (in article 34.5) had long since passed.

17. For the foregoing reasons, the Board upholds the respondent's second preliminary objection and, accordingly, this application is dismissed.

**2059-85-U United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., Complainant v. Jacmorr Manufacturing Limited, Respondent**

**Damages - Remedies - Unfair Labour Practice - Duty of unfair labour practice complainant to mitigate damages not paralleling that of a former employee in a wrongful dismissal action - Complainant making reasonable efforts to mitigate her losses - Board having jurisdiction to award damages for mental distress but such damages denied here because claim made too late**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *I. M. Stamp* and *P. J. O'Keeffe*.

**APPEARANCES:** *Larry Steinberg* for the complainant; *Steven J. McCormack* for the respondent.

**DECISION OF THE BOARD;** August 17, 1987, as amended September 23, 1987

I

1. This is a complaint under section 89 of the *Labour Relations Act* in which the union alleged that the grievor, Connie Campbell, was dealt with by the respondent employer contrary to sections 3, 64, 66, 79(1) and 89(7) of the Act. The union contended that the grievor was the object of a concerted campaign of harassment, intimidation and innuendo, which ultimately culminated in her discharge (for the second time) on November 13, 1985. The union argued that this was but one element in a pervasive pattern of anti-union conduct designed to remove an active union member from the work place, and demonstrate to other employees what could happen to them if they opted to support the union. The employer argued that Ms. Campbell was fired for cause, and that even if anti-union considerations entered into the decision, she was "trouble-maker" who should not be reinstated.

2. In a decision of the Board dated November 28, 1986 [now reported at [1986] OLRB Rep. Dec. 1709], the Board reviewed the evidence and unanimously accepted the union's characterization of the employer's conduct. The Board found that the employer had indeed contravened a number of sections of the Act, and had also failed to live up to the settlement of certain earlier unfair labour practice complaints. The Board made the following observations and remedial directions:

Remedy

75. We have already discussed Ms. Campbell's case at some length. We have no doubt whatsoever that she was victimized because she was identified as a union supporter, but we are not entirely sanguine about returning her to a work place in which she will inevitably face the hostility of both the employer and those employees who continue to oppose the union. If we are to carry out our statutory mandate, we should try to devise a remedy which, insofar as possible,

puts Ms. Campbell and the union in the position that they would have been in had she not been unlawfully discharged and, again, insofar as possible, neutralizes the advantages which the employer may have gained by its own unlawful conduct. Those advantages include keeping her out of the work place, for a year, while this litigation proceeded and the chilling effect which Ms. Campbell's discharge would likely have upon other employees who might fear for their jobs if they were identified as union supporters.

76. Boomer's response was heavy-handed and overt. Fler's response was more subtle and specific. The message was the same: employees who supported the union would face reprisals. The fact that there was a network of anti-union informers, prepared to report to Fler about the activities of their fellow-workers, would only heighten the employees' apprehensions. In the circumstances, it is difficult to construct a remedy which fully reflects the industrial relations reality, and the real possibility that, by its illegal conduct, the employer may well have accomplished its objective. There are not very many employees with the fortitude of Ms. Campbell and, in our experience, when employees are presented with the choice of renouncing their support for a union or facing employer hostility and reprisals, they often embrace the former option. A discreet discharge here and there may not even be particularly expensive or uneconomic from a long run point of view for (to adopt Boomer's phrase), a few selective discharges may "nip the union in the bud" - particularly if the employees victimized do not have an inexpensive and expeditious remedy for the violation of their statutory rights. They are faced with immediate unemployment and potential penury while this Board conducts its hearings and deliberates. It is not a well balanced equation, - particularly since the employer's superior ability to bear the costs of litigation may itself become a tactical consideration.

77. In order to redress an unfair labour practice complaint which necessarily effects the grievor, other union supporters, and the union itself, we make the following declarations and remedial directions:

1. We find and declare that the grievor, Connie Campbell, was discharged contrary to sections 64, 66 and 89(7) of the *Labour Relations Act*. We find and declare that she was discharged because of her trade union activity, not because of any default or culpable misconduct on her part. The allegations raised to discredit her were mere camouflage and a pretext to hide the employer's illegal intentions.
2. We direct that Ms. Campbell be reinstated in employment *forthwith*, to her *former job*, or some *other job* agreeable to *her* and for which she is suited, with full accumulated seniority.
3. We further direct that Ms. Campbell be compensated, *forthwith*, for all wages and benefits lost, and all other losses sustained by her between the date of her termination and the date of her reinstatement pursuant to this Board order. Such compensation shall include interest calculated in accordance with Practice Note 13 and must be paid, in its entirety, within twenty-one (21) days of the release of this decision. If such compensation is not paid, in full, or some question arises about the amount owing to Ms. Campbell, the present panel of the Board will remain seized and will schedule a hearing, on a peremptory basis, if necessary, to deal with the matter. We do not want Ms. Campbell to face the same difficulties as those employees discharged in October 1985, whose entitlement to compensation has still not been finally resolved.
3. For reasons similar to those enunciated in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, affirmed by the Divisional Court at 80 CLLC at para. 14,016 and again at para. 14,017, the respondent is directed to post copies of the attached Notice marked "Appendix" after being duly signed by Mr. Fler, the respondent's representative. Copies of this Notice must be posted in conspicuous places on the employer's premises where they will most likely come to the attention of the employees. Reasonable steps must be taken by the company to ensure that the said Notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises

must be given to the union so that it can satisfy itself that this posting requirement has been and is being complied with.

78. Given Ms. Campbell's pivotal role in organizing the union and the subsequent uncertainty, misrepresentation and inuendo surrounding her discharge advanced by the employer and certain friendly employee witnesses, we consider it imperative to demonstrate to the employees that their employer's position is not the last word or the only version of the truth, and that they can rely upon the Board to conduct an impartial adjudication of their rights. Employees, like Cliche, who engage in inappropriate conduct, cannot expect to shield themselves behind the *Labour Relations Act*, but, by the same token, union adherents, like Connie Campbell, cannot be victimized. *To this end, and in order to help dispel any residual questions, concerns, suspicions, or fears of the employees, we hereby direct that the employer provide a copy of this decision at its own expense to all current employees.* A posting of the decision is not enough. An employee who must scan a Board decision hurriedly, while at work, will not be able as easily to absorb its meaning and hence understand its significance (and his/her legal rights) as an employee who can read the decision, at home, in a more relaxed fashion.

79. In view of the opposition, by Fler and others, to Ms. Campbell's return, we believe she should be accorded certain specific protections lest the employer be tempted to treat the Board's Order in the same way as it treated the previous settlements - purporting to accept them, but, all the while, seeking some pretext to remove Ms. Campbell from the work place. We therefore direct as follows:

- (1) For the period of two years from the date hereof, the employer must not hold any meeting with Ms. Campbell which involves or could potentially result in discipline, unless she is first given a full and complete opportunity to have present, the trade union representative of her choice.
- (2) No discipline or termination shall be imposed upon Ms. Campbell unless she, and the union, are advised, in advance, in writing, of the specific reasons therefor.
- (3) Ms. Campbell shall be allowed free access to her personnel file in order to review any and all documentation contained therein. Such file shall contain all material upon which the employer intends to rely in its dealings with her.

80. Finally, the Board directs that the respondent and its officers and any person acting on behalf of the respondent cease and desist from:

- (a) interfering with the formation selection or administration of the trade union;
- (b) refusing to employ, continuing to employ or discriminating against a person, in any way, because s/he was or is a member of the union or was exercising rights under the Act;
- (c) threatening or penalizing employees because they have been or may become members of the union or have or may exercise any rights under the Act.

81. The Board will remain seized in case there is any difficulty implementing any aspect of this decision and remedy.

We should note those remedial directions were made pursuant to section 89(4) of the Act which reads:

Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and

*where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,*

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

[emphasis added]

3. At paragraph 81 of the decision, the Board indicated that it would "remain seized in case there is any difficulty implementing any aspect of this decision and remedy". The Board was subsequently advised that the parties have not been able to settle the amount of compensation to which the grievor is entitled, or the manner in which copies of the Board's decision are to be provided to employees in the bargaining unit. On the first point, the employer claims that the grievor has failed to mitigate her damages and is therefore entitled to little or no compensation for the year she remained out of work. On the second point, the employer claims that it is sufficient to have a few copies of the Board decision in its business office so that if an interested employee wishes to come in and pick one up s/he may do so. The Board convened a further hearing to consider each of these issues.

4. It will be convenient to deal first with the distribution of the Board's decision. The Board will then turn to the more difficult matter of the amount of compensation payable to the grievor. This latter question involves a consideration of both the doctrine of "mitigation", and counsel's novel claim that the grievor is entitled to some additional compensation for the harassment, mental distress, anxiety, and dislocation associated with the illegal actions which the employer took against her.

## II

### Distribution of the Board's decision

5. The distribution direction contained in paragraph 78 of the Board's decision (reproduced above) had a very specific remedial purpose. It was intended to ensure that all bargaining unit employees be aware of their rights, and the actual circumstances surrounding the grievor's termination and reinstatement. The employer had gone to some lengths to harass the grievor, inhibit her contact with other employees, penalize her for mere discussion of the employees' legal rights, and portray her as a "troublemaker". The company was quite prepared to rely upon and repeat any rumour or innuendo which might cast her in a bad light; and given the readiness of the respondent's witnesses to lie before this Board, we were not at all confident that the employees would appreciate what actually happened, or the nature of these proceedings, unless they had their own

personal copy of the Board decision to peruse at their leisure. That was important, where, as here, the company's anti-union campaign was based upon misrepresentation and threats or reprisals directed at those identified as, or suspected of being, trade union supporters.

6. During the course of the initial hearing the Board heard evidence about the way in which the company typically communicated with its employees. Pay cheques were handed out individually. Recall notices were delivered to the employees' homes by mail or courier. Disciplinary notices were also sent to the employees' homes. Where the employer considered it necessary to bring something to the attention of its employees, they were frequently given a personal copy of the document or notice. Such direct communication is perfectly understandable where one wants to ensure that the employees are made aware of the material in question.

7. In directing that "the employer provide a copy of this decision at its own expense to all current employees" it was the Board's intention, and expectation, that each and every employee in the bargaining unit would be given a copy of the Board decision. The Board did not specify whether the decision was to be handed out, mailed or delivered by courier, but the text of paragraph 78 clearly indicates that all current employees are to receive a copy of the decision that they can read in the privacy of their homes. There was no onus on the employee to come forward and ask for one, or to identify himself as someone who might be particularly interested in the contents of the decision - particularly since the decision was quite critical of the employer and would give some comfort to those individuals steadfast enough to remain union supporters despite the employer's egregious unfair labour practices. As the Board put it "it is imperative to demonstrate to the employees that their employer's position is not the last word or the only version of the truth, and that they can rely upon the Board to conduct an impartial adjudication of their rights". Information was an important antidote to the atmosphere created by the employer's illegal conduct. That is why the Board directed the posting of a notice and the circulation of its decision.

8. What was the employer's response? Not to distribute copies of the decision to the employees. The employer took the position that the employees were not really interested in the decision and it did not want to go to the expense of making multiple copies. The employer announced that copies of the decision would be available in its offices, and if any of the plant employees were really interested they could come in personally and request one. The union objected that it was totally unrealistic to require employees to personally request copies of a decision known to be critical of the employer, and to put themselves in the same physical circumstances in which Ms. Campbell had earlier been subjected to harassment and invective.

9. We agree; and lest there be any doubt whatsoever about the intended effect of the Board's remedial order, we direct that a copy of the Board decision be delivered to or placed in the hands of each and every employee in the bargaining unit, at the employer's expense. To the extent that this may be considered a clarification or revision of the Board's earlier order, we make it pursuant to section 106 of the *Labour Relations Act*.

10. It would appear, however, that it is unnecessary to comment further about this matter because we were advised by counsel for the employer that the evening before the second day of the "remedy hearing" (i.e. February 26, 1987 - the first day was February 13, 1987) the employer did in fact provide copies of the decision to all employees, despite its refusal to do so earlier. Thus, with the passage of time this aspect of the union's complaint may have become academic. If that is not in fact the case, we will entertain further submissions, in writing.

## III

Mitigation - in general

11. In fashioning a remedy under section 89 of the Act, the Board has historically been disposed to borrow from the common law of contract and apply a principle analogous to "mitigation", to reduce the compensation payable to an aggrieved party whose damages have been "artificially" inflated because he has not taken reasonable steps to reduce them. In the case of an employee unlawfully discharged, this usually implies some obligation to seek alternative employment. In *Little Brothers (Weston) Limited*, [1975] OLRB Rep. Jan. 83, the Board put it this way:

23. The grievor, however, is not entitled to any other compensation. When an innocent party experiences a breach of contract he is immediately shouldered with a duty to take reasonable steps to mitigate his losses. In other words, he must avoid avoidable losses and the justification for this duty stems from the policy that the purpose of damages in contract is compensation not penalization; (see E. Allan Farnsworth, *Legall Remedies for Breach of Contract* (1970), 70 Colum. L. Rev. 1,145). The Board has taken a similar stance in exercising its discretion under section 79 [now 89] of the Act to award compensation. It requires a complainant, who has been discharged, to take reasonable steps to mitigate his losses (see *Metropolitan Meat Packers Ltd.* 62 CLLC 16,230; *Murray Bros. Limited* [1969] OLRB Rep. Feb. 1,194; and *De Carlo Shoe Co.* [1965] OLRB Rep. June 224). The policy behind the imposition of this duty parallels that in contract. Section 79 used the word "compensation" and therefore if a duty to mitigate did not accrue to a grievor a monetary award given under section 79 would constitute something more than pure compensation. This is so in that the losses experienced by someone who does not attempt to mitigate are not, in a very real sense, all caused by the employer - a portion of the loss will stem from a grievor foregoing other income producing opportunities. To order an employer to compensate a grievor for this aspect of his losses would be to penalize the employer and section 79 is not designed to accomplish this end. If an individual wants to penalize an employer for a breach of the Act he must seek consent to institute a prosecution under section 90 [now 101] and, if granted, section 85, [now 96] upon the requisite proof, will accomplish the objective.

Similarly, in *Ernie's Signs Limited*, [1976] OLRB Rep. Aug. 404 the Board commented:

5. The purpose of ordering compensation in a case such as this is not to penalize the respondent but, as far as monetary compensation will allow, to put the grievor in the same position he would have been in if the violation of the Act had not occurred. There is, however, a duty which falls to the grievor and that is the duty to mitigate his loss. The common law doctrine of mitigation has been set out in the Canadian case of *Cockburn v. Trusts and Guarantee Co* (1917), 37 D.L.R. 701 at p. 702:

"The principle upon which the appeal ought to be decided is expounded at length in the judgment of Lord Haldane in *British Westinghouse Electric Co. v. Underground Electric Railways Co.*, [1912] A.C. 673, at pp. 683 and 690. After stating the general principle that when a contract is broken the injured party is entitled generally to receive such a sum by way of damages, as will, so far as possible, put him in the same position as if the contract had been performed - the damages being limited to those that are the natural and direct consequences of the breach - his Lordship proceeded as follows:"

"Their right to their livelihood was a matter of contract, and the body of legal principles so aptly named (until recently) the 'law of master and servant'. 'But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss ...this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business.' "

12. Each of these cases imports into the interpretation of the *Labour Relations Act*, certain

common law principles “borrowed” from the law of contract; but it must be remembered that the common law position is *not* entirely analogous to the statutory context under review. At common law, human labour was merely a commodity - an article of commerce like any other. Workers could be readily disposed of, whether or not their employer had just cause, upon “reasonable notice” - which for manual workers was not much notice at all. Indeed, it is interesting to note that the Court decisions referred to in *Ernie’s Signs*, *supra*, either were, or heavily relied upon, cases involving a breach of contract for the *sale of goods*.

13. The present situation is very different. There is no right to sever the employment relationship for any of the reasons mentioned in sections 64, 66 or 71 of the Act, and the presence of such motivation is sufficient to render the employer’s conduct illegal even if it is not the dominant one (see paragraph 4 of the first decision). Notice is irrelevant in this context. Indeed, as a matter of law, a worker discharged for trade union activity *continues to be an employee* despite his purported termination, because of section 1(2) of the Act which reads as follows:

For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

Counsel for the union asks, parenthetically: “Why should an individual be required to seek alternative employment when, at law, he remains an employee?”

14. This is not to say that the concerns underlying the *principle* of mitigation are entirely misplaced or have no application at all in the forum which we must administer. It is simply that one must remember that this is not an action for wrongful dismissal; but rather an effort to enforce *statutory* rights which rest upon an articulated *public policy* in favour of the establishment of collective bargaining relationships (see the Preamble to the *Labour Relations Act*). That difference was referred to in *P. J. Wallbank Manufacturing Company Ltd.*, [1980] OLRB Rep. Dec. 1797 at paragraph 4:

The Board has recently reaffirmed its position that a person who has been discharged has an obligation to take reasonable steps to mitigate his loss (see *Sutton Place Hotel*, [1980] OLRB Rep. Aug. 1250). In dealing with the common law duty to mitigate in the context of unlawful discharge cases, the Board must also keep in mind that, unlike at common law, a successful complaint almost always results in the reinstatement of the discharged employee. It would be shortsighted indeed to ignore the availability of this remedy and the frequency of its use when determining whether someone has taken reasonable steps to mitigate the loss. In other words, in an action for wrongful dismissal at common law, a discharged employee would be claiming an amount equal to his earnings for the period during which the court determines that he should have had notice of his discharge. He would not be entitled to reinstatement, and therefore has no need or interest to keep himself in a position where he can take up his old job again; on the contrary, his interest lies in picking up the pieces and embarking on a new enterprise as soon as possible. Where reinstatement is available as a remedy, and commonly awarded, it would be unrealistic to ignore that the discharged employee has every reason to believe that he may be returning to his old job. The interpretation of his obligation to mitigate must be considered in light of his obvious interest in keeping himself in a position to resume his former employment.

(See also: *Beckett Elevator* [1986] OLRB Rep. Nov. 1493).

15. There are additional policy and practical reasons why the common law approach to mitigation must be adapted to this special statutory regime - particularly in a case such as this. We have found here (as in many cases in which key union organizers are discharged) that one of the main reasons for terminating Ms. Campbell was to remove her from the work place and inhibit her ability to talk to other employees about the union or collective bargaining. Campbell was a leader who helped recruit union supporters. She became their principal spokesman. She was the catalyst

that maintained the momentum of the organizing drive; and, afterwards, despite harassment, intimidation and discharge, she continued to serve on the bargaining committee and kept in touch with other union supporters to bolster their spirits. Her critical role was summarized in paragraphs 62 and 65 of the Board's first decision:

It was Campbell who initially mobilized the union supporters. It was Campbell who refused to bow to Boomer's intimidating and grossly illegal conduct - conduct which even the company does not now condone. It was Campbell who was the sole union enthusiast elected to the negotiating committee on Sunday, November 10, 1985 - just three days before her discharge and a week after she had signed the November 7 settlement on behalf of the union. It was Campbell who, to the employer's knowledge had held numerous meetings in her home to encourage employees to support the union. It was Campbell who had reminded Fler that the company was not above the law. She really was a principle source of "trouble", if by that term one means an employee's assertion of her legal rights or the obligation to bargain collectively. So long as she remained at work Fler and Boomer faced a challenge to their previously unfettered managerial prerogatives and in their effort to get rid of her, any pretext would do. We find that she was fired because of her trade union activity.

65. In fact, the employer had quite a bit to gain from firing the grievor - as Fler frankly indicated, although putting a different construction on his motive. The grievor was a leader with courage and determination not to be bullied or denied her statutory rights. She was the one most responsible for mobilizing employee support for the union. She believed that "the law" would protect her. Her removal from the work place would undermine the cohesion of the union supporters, encourage and support union opponents, and send a graphic message to employees about what happens to those who challenge the employer's authority or assert their statutory rights. Ms. Campbell's fate would certainly give pause to any employee contemplating union office, a position on the bargaining committee or any other union role which would bring him/her to the particular attention of the employer. To be identified as a "key union supporter" is to court discharge - an action which would be abetted and applauded by the anti-union employees. Even if Ms. Campbell was ultimately reinstated (as we find she should be) the employer has been successful in keeping her out of the plant for more than a year. With the passage of time, employee turnover, the continuing efforts of the anti-union employees, and the example of what befalls those who support the union too vocally, the union's support has, quite probably, been seriously eroded.

16. The employer's purpose was to expel the grievor from the plant and inhibit contact with other employees who might be sympathetic to the notion of trade union representation. That purpose was unlawful, as were the means employed to accomplish it. Yet on the issue of mitigation, the respondent contends that the grievor was compelled to seek employment elsewhere - which would have limited her opportunity to maintain contact with the ongoing lawful union activities of the respondent's employees or participate as their elected spokesman during the protracted negotiations for a first collective agreement. But that is precisely why the grievor was fired in the first place.

17. It is against this background that one must assess the employer's assertion that the grievor must seek work elsewhere (even though, at law, she remained an employee) or face the possibility that she will receive no compensation for her unlawful discharge. In effect, the employer seems to be saying:

"The Board has found that I discharged you to remove you from the work place and undermine the union's bargaining position. The Board has found that my purpose was to inhibit your contact with other employees, and limit the effect of your pro-union activities. But if you do not stay away from the work place seeking employment elsewhere, you will receive no compensation at all. The law requires you to stay away and take up employment elsewhere until your right to reinstatement has been determined by the Labour Relations Board. If you continue to act as if you were an employee, and do not pursue an active job search, and if you continue to engage in those union or collective bargaining activities which precipitated your discharge, you will prejudice your claim to compensation."

In a case such as this, that submission has all of the appearance of a plea for a “free unfair labour practice”; or the company accomplishing indirectly, what it is prohibited from doing directly.

18. As the Board noted in *Wallbank* above, any assessment of a complainant’s obligation to seek alternative employment must bear in mind that his principal objective is to get on with his unfair labour practice complaint and obtain reinstatement to his former position. In this regard, an unfair labour practice complainant is in a very different position from a plaintiff in a wrongful dismissal action. The unfair labour practice complainant will not and need not be seeking permanent alternative employment opportunities, and to the extent that he is honest (or if asked in a job interview) he may well reveal that he has been discharged for trade union activity but is seeking reinstatement to his former job. That process may involve protracted litigation and absence from work to consult counsel or attend Board hearings. It may also involve continuing efforts to promote employee self-organization or collective representation, just as if the grievor remained an employee - as, of course, at law, he does. No doubt this may limit the range of available work opportunities, (particularly if a prospective employer has anti-union sentiments), but that is a problem inherent in a situation where an employee has been illegally discharged and must resort to litigation to get his job back. And, of course, it is the respondent employer that is responsible for that.

19. We do not think that it is appropriate to abandon the notion of mitigation altogether as the Canada Labour Relations Board has done (see for example: *Samuel John Snively* (1985) 12 CLRBR (N.S.) 97; *Victoria Flying Services Ltd. et al* [1979] 3 Can. LRBR 216; and *Gerald M. Massicote* [1981] Can. LRBR 427). To adopt that approach in all cases would introduce into the Board’s award of damages a “penal” quality which in our view is inconsistent with the purpose of section 89 of the *Labour Relations Act*. In this, we agree with the analysis of the Board majority in *Little Brothers* above. But, by the same token, we do not think the duty to mitigate parallels that of a former employee in a wrongful dismissal action. Under the *Labour Relations Act*, there are statutory and policy considerations which enter into the equation; and, in our opinion, the duty to mitigate is not, and should not be the same as that imposed at common law in a wrongful dismissal action.

20. There are already powerful practical pressures on a complainant to seek alternative work. After all, he must still eat, and pay the rent, and he always faces the risk that his complaint will not succeed. It is unlikely that very many workers can really afford to remain idle for very long, awaiting a “windfall” at their employer’s expense; and to the extent that he does earn income elsewhere, such sums should be deducted from any subsequent compensation award. However an employee discharged contrary to the Act is not like an employee wrongfully dismissed with no right or expectation of reinstatement. An unfair labour practice complainant need not devote his full energies to seeking permanent work elsewhere, nor must he discontinue his union activities in connection with his former workplace. He is entitled to conduct himself as if he were an employee temporarily and unlawfully put out of work, who will be returning to his job as soon as the litigation process can be completed. Of course, if he misjudges the strength of his case, he may find himself without any job or compensation at all.

21. With these general comments, we return to the circumstances of the instant case.

#### IV

22. For the complainant, the work routine at Jacmorr was ideal. She and her husband were both employees, and they were able to “dovetail” their work schedules so that they could care for three small children. The plant was located close to their residence so that child-care responsibilities could be easily apportioned.

23. The situation became much more difficult following the complainant's unlawful discharge. She could no longer count upon a convenient work schedule. Transportation became a problem. Nevertheless, Ms. Campbell did make efforts to find alternative work. She monitored newspaper advertisements, sent resumes, and made personal visits to prospective employers in her immediate area. She was constrained by her child-care responsibilities and the economic reality that, at wage rates at or near the minimum wage, the cost of daycare would substantially consume any income she might earn. She was also constrained by the fact that she remained involved in proceedings before this Board, and continued to serve as an employee representative in collective bargaining negotiations, which turned out to be a time consuming exercise. Eventually, she found a job working evenings and nights at a local pizza parlour, but was forced to quit when she found it too difficult to return home at 4 a.m. and arise with the children at 7 a.m.

24. In accordance with her counsel's instructions, Ms. Campbell recorded the details of her job search in a diary which could subsequently be produced if mitigation became an issue. Unfortunately, at the time of the compensation hearing, the diary was no longer available. Ms. Campbell's husband had destroyed it.

25. On the basis of the evidence before us, the Board is satisfied that the complainant made reasonable efforts to mitigate her losses.

## V

### Calculating compensation

26. Because Ms. Campbell was out of work for so long, the precise quantum of compensation to which she is entitled will depend, in large measure, upon the assumptions which one makes about her probable career path between November 1985 when she was discharged, and January 1987 when she went back to work. This, in turn, requires an assessment of such things as the impact of periodic wage increases, overtime opportunities, and the likelihood of her receiving the productivity bonuses which she routinely earned in the period prior to her termination. Such items, of course, can never be determined with mathematical precision. The Board must make its best judgment on the basis of the evidence before it, and what seems most probable in all the circumstances.

27. On that basis, (with an exception noted below) we are inclined to accept the assumptions underlying the complainant's claim detailed on Exhibit A filed at the compensation hearing; namely:

1. After three months service she would have received a wage increase in the neighbourhood of 30 cents per hour;
2. Her wage would have risen to \$5.75 per hour in August 1986 pursuant to the salary grid in the collective agreement which she helped negotiate;
3. After mid-September 1986 her hours of work would have increased and she would have been treated for all purposes as "full-time" (as she eventually was following her reinstatement in January 1987);
4. She would have received a productivity bonus close to the maximum obtainable under the employer's incentive payment system;
5. She would have worked most available weekend overtime opportunities where, again, she would be entitled to incentive bonuses.

The basis for those assumptions was either substantially confirmed, or not plausibly disputed, by Frederic Radler, the employer's "comptroller" who gave evidence on the compensation question. However, the figures listed on Exhibit A for the period between July 1 and July 31, 1986 must be reduced by 25% because they included one week in which the plant was shut down and, while some employees did work during that week, the evidence does not establish that the complainant would have been one of them.

28. Having regard to the evidence before us and what we consider to be the most probable pattern of the grievor's earnings, we find that she would have received from regular wages, overtime opportunities, and incentive bonuses a total of \$13,622.80. Interest on that sum calculated in accordance with Practice Note 13 to the date of the Board's reinstatement direction amounts to \$707.34. In addition, the grievor would be entitled to vacation pay at 4% of her gross earnings between November 13, 1985 and July 26, 1986, being \$262.56. From this total of \$14,582.70 must be deducted sums actually earned from the trade union and the pizza place for which she worked, and the sum already paid to her by Jacmorr on a without prejudice basis. When those amounts (\$487.46, \$1670.24, and \$1417.53, respectively) are taken into account, her wage claim (including interest and vacation pay) amounts to \$11,007.47.

29. Having regard to the foregoing, the Board directs that the grievor be paid, forthwith, the sum of \$11,007.47 (less statutory deductions).

## VI

### General Damages

30. The final head of compensation claimed by the complainant was described by her counsel in various ways, but, for convenience, we will refer to it as a form of "general damages" for the protracted pattern of threats and harassment to which she was deliberately subjected. In counsel's submission, those unlawful pressures had their impact, and demand redress quite apart from any "special damages" relating to the complainant's direct wage and benefit losses. We were asked to take into account and remedy the dislocation, inconvenience, and emotional stress associated with her unlawful treatment.

31. Counsel for the complainant urged the Board not to take a narrow view of its remedial jurisdiction nor limit its award of compensation simply because certain items might appear to be novel. So, he maintains, are the facts of this case. In this regard we were referred to the decision of the Divisional Court in *Tandy Electronics Limited v. United Steelworkers of America et al* (1981), 30 O.R. (2d) 29, where the Court commented:

So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.

Counsel asserts that the complainant's anxiety, apprehension, frustration and mental distress are the natural and intended consequences of the illegal actions taken against her. The fact that it may be difficult to calculate "general damages" to compensate her for these wrongs, is no reason not to try.

32. There is much to be said for the general thrust of the complainant's argument. The Act specifically identifies and prohibits various kinds of "intimidation", "coercion" and "threats" which are (and are intended to) have an impact other than direct economic loss, and the notion of "general damages" is certainly not novel. Nor is there anything unusual in the fact that "general

damages" may sometimes be difficult to quantify. Courts address issues of that kind every day. In an action based upon negligence, general damages may be recovered for pain and suffering, injury to health and personal inconvenience - all rather difficult to assign a precise economic value. In an action for defamation, Courts grapple with the value of the plaintiff's reputation, and how best to compensate him for the ridicule or contempt in the community to which he may have been subjected. Indeed, even in a wrongful dismissal proceeding - an action in contract, not in tort - one can now recover damages for what is variously described as "mental distress", "injured feelings", "vexation", "anxiety", or "frustration", so long as those consequences are reasonably foreseeable and causally connected to the breach of contract (see: *Brown v. Waterloo Regional Board of Commissioners of Police* (1982), 136 D.L.R. (3d) 49; and cases referred to therein). Adjudicators under the *Human Rights Code* now routinely award monetary compensation for "mental anguish" or for "humiliation" on language not unlike that found in section 89 of our Act. Thus there is some precedent - albeit in other contexts and other forums - for compensation beyond an immediate loss of wages or other economic benefits. It would be odd (or so counsel says) that a plaintiff could, at common law, recover damages for anxiety consequent upon *inadequate notice* of termination, but an unfair labour practice complainant could not recover full compensation for *intentional* harassment, intimidation, and coercion culminating in an unlawful discharge - all forms of deliberate misconduct expressly prohibited by statute.

33. Is the Board in such cases restricted to a mere declaration that the illegal conduct has occurred, and a direction, some weeks or months later, that it should not happen again? Is that the only remedy for an employee who has been harassed, intimidated, brow-beaten or persecuted but not actually fired? Can s/he only obtain compensation if the employer takes that final step, and then only for the wages lost? There are good policy reasons for rejecting that restricted view; for, to hold otherwise, would be to limit the Board in a number of extreme cases, to making only an express direction prohibiting that which the statute already clearly proscribes; and that would, in purely practical terms, virtually ignore all illegal conduct and consequences that did not result in direct economic losses to the aggrieved employee. But there is nothing in the statute which would foreclose monetary compensation for these independent breaches of the Act, and we see no reason to "read in" such limitation. Nor do we see any reason why this Board should be less sensitive than the Courts or other tribunals to the possibility that illegal conduct may give rise to a form of general damages.

34. This is not to say that the Board should award compensation in the form of "general damages" simply because it is affronted by the egregious nature of the employer's conduct or the "shocking high-handed and arrogant fashion" in which a particular complainant may have been treated (to borrow the language of Linden, J. in *Brown*, or Fitzpatrick, J. in *Pilato v. Hamilton Place Convention Centre Inc.c.o.b. Hamilton Convention Centre* (1984)) 3 C.C.E.L. 24). "Punishment" has no place in assessing compensation under section 89 of the *Labour Relations Act* - as the Board made clear in *Little Brothers, supra*, and the Divisional Court affirmed in *Tandy, supra*. Punishment is properly dealt with by the Courts under section 96 of the Act either for a breach thereof, or for a failure to comply with a Board determination. But in our opinion the facts and circumstances of a discharge, and the events which preceded or followed it, may, in appropriate cases, sustain a claim for "general damages", in addition to any loss of wages or other employment benefits which a complainant may have suffered.

35. In the instant case, though, the problem is not really one of legal principle or labour relations policy. The difficulty lies in the fact that the claim for general damages (described, *inter alia*, with reference to "mental distress") surfaced only at the hearing convened to calculate the quantum of compensation payable to Ms. Campbell. This rather unusual damage claim, based upon quite debatable issues of law and policy was not raised in the initial proceeding before the

Board and, accordingly, is neither recognized nor easily accommodated in the remedial order which the Board actually made (see paragraph 77 of the original Board decision). In the circumstances we are asked, in effect, to amend our original remedial direction to include a novel general damages claim under the rubric of "implementing" a compensation direction which does not specifically contemplate that kind of claim. Whatever its attractions (and in an appropriate case there may be many) we decline at this stage to do so here.

## VII

### Costs

36. Counsel for the complainant also claims "costs", which, he says, should include not only the legal fees expended in sustaining the complainant's position, but also certain out-of-pocket expenses (babysitters, travel, meals associated with her attendance at the various Board hearings etc.). However, in accordance with its usual practice, the Board is not persuaded that it should award "costs", even though we do not doubt that these sums were properly and necessarily expended to vindicate the complainant's position. The Board has generally taken the position that it would be inappropriate to award "costs" to a successful complainant, when its jurisdiction to award "costs" to a successful respondent remains in doubt. (i.e. if a complaint is dismissed). Costs should be reciprocal, and it is not clear that the statute permits that. Accordingly, the complainant's request for "costs" is hereby denied.

37. Having regard to the foregoing, the Board *directs* that the respondent pay Ms. Campbell *forthwith* the sum of \$11,007.47 less any statutory deductions associated with the wage component of this sum.

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### **3388-86-R Ottawa Newspaper Guild, Local 205, Applicant v. The Ottawa Citizen, A Division of Southam Inc., Respondent**

**Bargaining Unit - Certification - Union seeking bargaining unit comprised of the computer information services department of a newspaper - Unit one of the few departments remaining unorganized - Where there has been a history of fragmentation the Board may consider a departmental unit to be appropriate - Sufficient community of interest and no serious labour relations difficulties would result if unit found appropriate - Tag-end unit not yet necessary - Departmental unit found appropriate**

**BEFORE:** *Robert J. Herman*, Vice-Chair, and Board Members *J. Wilson* and *E. G. Theobald*.

**APPEARANCES:** *Cathy Lace*, *Joseph Hanafin* and *Steve Lundy* for the applicant; *Colin Morley*, *J. Lynn Thomson*, *Ted Allen* and *Ken Hills* for the respondent.

**DECISION OF THE BOARD;** August 14, 1987

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The applicant ("the Guild") is seeking certification as the bargaining agent for approximately 13 employees comprising the computer information services department of the respondent ("the Citizen"). The respondent publishes a daily newspaper in the Ottawa area, and there are currently 7 different collective agreements covering employees in various departments of the Citizen. In this application, the Guild seeks to represent a bargaining unit of employees in one of the few departments remaining unorganized at the Citizen.

4. The Citizen disputes the appropriateness of the bargaining unit applied for, and submits that a tag-end bargaining unit would be appropriate in the circumstances. In the alternative, the Citizen submits that the computer information services department employees do not have a distinguishable community of interest, and they ought to be included in a bargaining unit with employees in the advertising department.

5. At the conclusion of the hearing, the Board orally ruled that a bargaining unit consisting only of employees of the computer information services department was appropriate, with reasons to follow. We now provide those reasons.

6. The facts were not in substantial dispute, and were received by the Board by way of submissions from counsel. No *viva voce* evidence was requested by the parties or entertained by the Board. For purposes of the disposition of this matter, we have accepted as true and provable those factual submissions, and where those submissions conflicted, we have relied upon the submissions of counsel for the Citizen, as agreed between counsel.

7. The computer information services department services most other departments of the Citizen, through the use of 6 computers. There are 3 main computers: one utilized to service the circulation department, one utilized to perform various off-site work and serve the payroll and personnel departments, and one of which services the advertising department and the business office (credit department). There are also 3 micro-computers: one serving the newsroom for editorial and story composition purposes, one utilized for classified advertising purposes, and the third used predominantly as a backup computer and remaining dormant for the most part. The computers are connected to most areas in the two buildings of the Citizen, through approximately 175 computer terminals located in the various departments, with approximately 23 terminals in advertising, 56 in news, 26 in circulation, and 21 in composing. The remaining terminals are scattered throughout the respondent's operations. The terminals are utilized both by employees in bargaining units and those who are unorganized so their use is not reflective of the bargaining structure and pattern of the Citizen.

8. Employees in the computer information services department fall into two categories, computer operators and data-entry employees. Eight or nine employees are computer operators, and their duties consist of running programmes for the various departments of the Citizen, storing the information which the programmes elicit, and printing hard copy where necessary of the information retrieved. Computer operators store information on magnetic tape, and perform trouble-shooting, maintenance, and repair on the system and terminals throughout the building. If the problem with the equipment is serious, the trouble-shooting or repair may have to be performed by people expert in the computer repair field, and not by the computer operators. The operators also perform a wide variety of relatively minor functions, including the drawing up of payroll cheques and bills, the printing of bundle wrappers for the circulation department for the daily newspapers, and the deletion of copy which the Citizen no longer requires be stored. The operators perform functions for virtually all departments of the Citizen, including production of lists or information where requested by a department, trouble-shooting of terminals located in the departments, and responding to complaints from departments concerning computer services.

9. Approximately four people perform data entry functions, and unlike the computer operators who provide service to most departments of the Citizen, ninety percent of data entry work is performed for the advertising department. This work consists largely of typing in, or inputting, information for the advertising department, such as the content of the advertisements and the punching of advertising codes. The remaining ten percent of the work is performed for the business office, and includes data entry functions with respect to accounts payable and cheque requisitions. The business office has its own employees performing similar functions, on terminals located within the business office.

10. Although the bulk of data entry work is performed for the advertising department, the great majority of the work of computer operators, and therefore of the computer information services department, is to service all departments of the respondent. There is some interchange of employees between the computer information services department and other departments of the Citizen, but that interchange has occurred only for short periods of time in response to special needs, or has occurred a number of years ago, or has involved the interchange of employees with unionized departments and not with employees in advertising. Most employees work from 8:00 a.m. to 6:00 p.m. although some shift work is done by both data entry and computer operators.

11. The Citizen has structured the department as essentially self-contained, with its own management reporting structure. Although the manager's office is physically located in the advertising department, the manager is responsible solely for managing the computer information services department, and makes final decisions on hiring, firing, and discipline. While personnel may initially screen candidates for employment and may become involved in disciplinary matters, final decisions are taken by the department's manager.

12. Employees in the department share many basic benefits with other employees, whether unionized or non-unionized. The department has its own separate wage classification, and decisions with respect to the merit component of wages are made within the department. With respect to the employees' background and skills, the Citizen has not insisted on prior computer experience when hiring employees, though the manager looks for some "aptitude" for working with computers and people with prior computer operator background are preferred.

13. There are currently 7 separate bargaining units and collective agreements at the Citizen. The Ottawa Typographical Union represents four bargaining units, each with its own collective agreement, covering in turn employees in the composing room, mail room, part-time mail room, and inserters. The Ottawa Printing and Graphic Communications Union has one collective agreement covering pressmen, paper handlers and camera plate employees. The Guild currently has two collective agreements, one general or omnibus agreement covering a disparate number of classifications, including editorial, business office, building maintenance, circulation, printing and storage employees. Its other bargaining unit and collective agreement encompass approximately 6 employees in fleet control. The omnibus collective agreement evolved over time from a series of individually acquired collective bargaining rights and smaller bargaining units. In 1950 the Guild was certified to represent editorial employees and negotiated a collective agreement accordingly. In 1952, it was certified to represent circulation employees, and a collective agreement was signed on their behalf, and in 1953 to represent proofreaders, teletype setters and maintenance employees and a separate collective agreement was concluded on their behalf. In 1954, the Guild and the Citizen merged or folded those three separate bargaining units and agreements into one general collective agreement. In 1955, the Guild was certified to represent employees in the business office, and shortly thereafter negotiated with the Citizen a supplemental collective agreement, covering the business office employees within the main agreement. In 1957, the Guild obtained bargaining rights for scanengravers, and they in turn were folded into the omnibus collective agreement. In

1972, the Guild was certified to represent part-time drivers and, consistent with past practice, the Guild and the Citizen agreed to include these employees in the main agreement. All these individual departmental bargaining units were agreed to by the parties during the certification proceedings and the parties subsequently agreed to include the employees affected within the confines of the main collective agreement.

14. This practice took a decided turn in 1981. In that year, the Guild was certified to represent a group of approximately 6 employees in fleet control (i.e. maintenance of the trucks). As in the past, the parties agreed to a departmental bargaining unit description, this time encompassing only employees in fleet control. For the first time, the Citizen took the position that this small departmental bargaining unit should remain a distinct bargaining unit, and it would not agree to the Guild's request that it cover these employees and the fleet control bargaining unit under the main agreement. Accordingly, in 1982 separate collective agreements were negotiated and signed with respect to fleet control employees and all other employees represented by the Guild. This also occurred at the next round of bargaining in 1984. In the current round of negotiations, the Guild is again seeking to have the main collective agreement include fleet control employees. The Guild advised the Board, should it be successful in the instant application, that it will be seeking to include employees in the computer information services department within the ambit of the main collective agreement. It is the Citizen which in recent times has insisted on small bargaining units, and a fragmented bargaining structure.

15. Turning to the submissions and legal argument, we do not propose to refer specifically to all the cases cited by counsel. Until approximately 1981, organizing and the certification of bargaining units in the newspaper industry received special treatment by the Board. As the Board noted in *The Spectator, a Division of Southam Inc.*, [1981] OLRB Rep. August 1177:

7. As a general practice the Board does not grant certification on a departmental basis. For historical reasons exceptions were made in the newspaper and printing industry. Those industries were traditionally organized by craft unions at a time, long pre-dating the existence of this Board, when the printing trades were distinguished by specialized skills that gave rise to clear distinctions along craft lines. (See Zerber *The Development of Collective Bargaining in Toronto Printing Industry in the 19th Century* (1975) 30 IR/R1 83. From its earliest days the Board granted certificates in the newspaper industries reflecting the traditional craft designations. (See, e.g. *The Ottawa Citizen*, [1944] OLRB Rep. Aug.; *The Star Publishing Company of Windsor, Limited*, (1945) CLLC ¶10,424. The traditional preponderance of craft units in the newspaper industry tended to produce more fragmented bargaining structures than would be encountered in other industrial settings. That may explain why, over the years, the Board often acceded to the agreement of the parties to departmental units of employees who did not possess craft skills. Generally in an industrial setting the Board would, apart from any special craft units, contemplate a breakdown of employees for collective bargaining purposes into office and clerical employees on the one hand and production employees on the other. When a plant is substantially organized along those lines any union seeking to obtain certification for a departmental unit is normally required to take a tag end unit of all unorganized employees. The obvious reason is to avoid undue fragmentation in collective bargaining.

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9. The foregoing passage indicates the Board's concern for the excessive fragmentation of bargaining units while recognizing the countervailing value of giving the greatest weight to the agreement of the parties in the structuring of bargaining units. Implicit in that statement, however, is an indication that where there is no agreement between the parties on the structure of a bargaining unit in the newspaper industry the Board will not hesitate to apply established general principles respecting community of interest in fashioning appropriate bargaining units. This is the first application in the newspaper industry which we are aware in which the parties have not been agreed on the designation of the bargaining unit. To that extent the Board is compelled to address the question of whether non-craft departmental units should be the presumed

rule in the newspaper and printing industry or whether collective bargaining could be appropriately grounded on a more comprehensive basis.

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12. We see no reason why, in a similar case, this Board should arrive at any different conclusion. When the employees of a newspaper or printing shop perform discernable craft skills and an established craft union applies to represent them in collective bargaining the overriding policy of the Act, expressed in section 6(2), is that the value of special representation overrides the disutility of fragmentation. On the other hand, where employees do not exercise technical skills or perform craft work which meaningfully distinguishes them from other employees there should be no presumption in favour of fragmentation. In future applications in the newspaper and printing industry, therefore, where it does not appear on the evidence that the preconditions to the certification of a craft unit are made out the Board will be open to submissions for the structuring of bargaining units on the basis of normal considerations of community of interest. There should no longer be any presumption that non-craft bargaining units will be structured by department; without limiting the direction in which the Board may wish to take in any given case we see no reason why in the newspaper and printing industry, apart from the establishment of legitimate craft units, the representation of employees for collective bargaining purposes should be any less comprehensive than in other industries. Where the evidence discloses a separate community of interest among all office and clerical employees, all mechanical production employees and all editorial or newsroom employees bargaining units should be fashioned accordingly.

16. For the most part, we agree with and adopt these comments. As paragraph 12 of that decision reflects, where the prerequisites for certification of a craft unit in the newspaper industry are not made out (and they are not suggested in the instant application) the Board will consider the question of the appropriateness of the bargaining unit "on the basis of normal considerations of community of interest". The general principles which the Board applies in the typical certification proceeding (not arising in an industry that has historically received special treatment) will be applied in the future in the newspaper industry. We will say more about those principles shortly. In paragraph 9 of *The Spectator*, the Board commented that "where there is no agreement between the parties on the structure of a bargaining unit in the newspaper industry the Board will not hesitate to apply established general principles respecting community of interest in fashioning appropriate bargaining units". We do not adopt this statement if interpreted to suggest that where there is agreement between the parties, the Board would *not* apply established general principles. In our view, the agreement of the parties in no way ousts or alters the application of community of interest and other relevant principles with respect to determining the appropriate bargaining unit. Rather, the agreement of the parties is simply an indication of the parties' joint assessment of the appropriateness of the unit and, for example, the dangers in the particular work place of fragmentation or the existence of a community of interest, and as such is to be seriously considered by the Board. The Board will not lightly discard an agreement between parties who must live with its consequences. However, as numerous decisions have noted, the Board will not be bound by the agreement of the parties where the Board is not also persuaded that the proposed bargaining unit is appropriate in the circumstances.

17. In a recent series of cases, the Board has at some length discussed the general principles applicable to a consideration of the appropriate bargaining unit, to enable parties to organize their affairs and conduct themselves with some expectation interest. In *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, the Board observed:

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunity of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines on job progression to the detriment of all concerned. A fragmented bargaining structure also inevitable [sic] spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differentials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

18. In *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board wrote as follows:

17. Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While

the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

...

23. ...We might make an additional but related observation. We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: *does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.*

[emphasis added]

19. The Board approach in this area was comprehensively canvassed and summarized in *TV Guide Inc.*, [1986] OLRB Rep. Oct. 1451, a decision which also summarized the major decisions of the Board dealing with organizing in the newspaper industry. Both parties relied heavily on that decision and the excerpts from prior decisions recited therein. In *T.V. Guide*, the Board had to decide whether a bargaining unit consisting only of editorial employees of a magazine (not a newspaper) was appropriate in circumstances where the magazine was not yet organized, and there were no existing bargaining units. The Board ultimately concluded the unit sought was inappropriate, both because it was not satisfied that the editorial department employees had a distinct community of interest, and because of concern for undue fragmentation of the work place. A reading of that decision amply demonstrates that panel's concern for the problems fragmentation might create, and its concern that certifying the first union at *TV Guide* to represent only the editorial department would generate those problems. The Board wrote as follows:

66...In *Hospital for Sick Children* there was no problem of potential fragmentation because the disputed employee group would be assigned to one "generic" bargaining unit or the other; whereas in the instant case, the respondent's principal concern is the possibility of future fragmentation if departmental bargaining units are accepted as the norm....

These comments illustrate a recurring theme in the Board's jurisprudence: how to reconcile the employees' right of self-organization (which may suggest a narrowly-defined bargaining unit which is relatively easy to organize), with the need for a rational and viable collective bargaining structure which will minimize labour relations problems in the long run.

...

68. Finally, at the risk of repetition, we must emphasize again, the Board's traditional and continued reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmented bargaining which that creates (see, for example: *Cryovac Division, W. R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Rosco Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry, where departmental unionization has existed in the extreme, the Board indicated in 1981 in *The Spectator* that it would no longer routinely accept departmental bargaining units which were not demonstrably appropriate. Most recently, in *T. Eaton Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board repeated that it would not be conducive to orderly collective bargaining to divide up an employer's business into bargaining units based on departments....

• • •

85....Moreover, in order to overcome the deficiencies of fragmentation, unions and employers have tried to amalgamate units or create broader-based bargaining (such as at the *Toronto Star*) - thereby approximating something that the Board would routinely establish in the first instance in virtually every other industry. One of the reasons why collective bargaining "works" at the *Star* is because the Guild represents one big bargaining unit not fifteen or twenty separate ones.

• • •

87....Since the *Spectator* there has been no general retreat from the concerns expressed in that case. In *Peterborough Examiner*, [1982] OLRB Rep. March 432, it was the union (the ITU) which initially sought an "all-employee" unit and the employer which demanded bargaining units segregated by department. There were already in place two existing bargaining units of "pressmen" and "composing room employees". The evidence does not indicate the facts of the employees' relationship, but the Board ultimately decided to reject the employer's position and certify a consolidated unit of office and clerical employees, and a separate unit of editorial department employees. In *Welland Evening Tribune*, [1982] OLRB Rep. March 513, the ITU again applied for a broader-based bargaining unit and the employer sought a narrower one. The Board held that it should take an "open and pragmatic attitude to the rationalizing of bargaining structures in the newspaper industry", and after canvassing the wishes of the employees found a comprehensive bargaining unit to be appropriate. In the *Sault Star, a Division of Southam Inc.*, [1983] OLRB Rep. June 980, there were already four bargaining units in the employer's enterprise and "both parties expressed satisfaction with the viability and workability of the proposed [departmental] bargaining unit". There was no interchange of employees or "lines of progression" between the units and, in the Board's view (with which we agree), the key to the *Spectator* decision is the disagreement of the parties. In the result, the Board accepted the agreed upon bargaining unit. Thus, in each of these cases there was either an existing pattern of departmental units or the agreement of the parties, or both. In none of them is there any indication of the kind of evidence we have here.

88. Clearly, in any enterprise there may be several possible bargaining unit configurations or degrees of appropriateness. Where the parties have themselves selected a bargaining unit with which they are comfortable, the Board should not lightly intervene and "second-guess" their choice. The very fact of their agreement represents some evidence of a willingness to make the kind of accommodations necessary to make collective bargaining work or, at least, some tolerance for the problems or frictions associated with fragmented bargaining. In the absence of some demonstrable third party or public interest there is simply no reason to disregard the wishes of the parties and precipitate a controversy where there was none before. On the other hand, bargaining units based upon the agreement of the parties will necessarily have less precedential value - especially when there is little detailed information about the context in which such agreements were reached. Here, of course, there is no agreement on the definition of the unit and there is evidence to suggest that the unit which parties often agree to in other circumstances is not "appropriate". There is no established pattern of fragmented, departmental bargaining in this enterprise, or in the magazine industry, and even if newspapers are a close analogy, the Board in the *Spectator*, *supra*, indicated that in the absence of the agreement of the parties it would be disposed to fashion the bargaining unit in accordance with the usual general

principles applied to the particular circumstances of the case. Accordingly, it can come as no surprise to the Guild that, in the absence of the agreement of the parties, departmental bargaining units are not something which the Board will automatically accept.

...

90. This is not to say that on the agreement of the parties, or in a newspaper, or where there is a pre-existing pattern of multi-unionism or fragmented bargaining, or where, on balance, the facts clearly warrant it, the Board might not find a departmental bargaining unit to be appropriate. We prefer not to speculate. That is not the situation here. For the purposes of this case, it is sufficient to say that the departmental bargaining unit proposed by the Guild in this case is not appropriate for collective bargaining, and that the appropriate bargaining unit should encompass all employees of TV Guide Inc.

20. What emerges from these excerpts from *TV Guide*, and from the decision in its entirety, is the concern of the Board that it not find appropriate a bargaining unit which would cause fragmentation problems for the employer. But as that decision also notes, where there has been a prior history of fragmentation (and no demonstrable serious labour relations problems flowing from that fragmentation) the Board might well be prepared to find appropriate a departmental bargaining unit. As *TV Guide* put it:

85....Moreover, in order to overcome the deficiencies of fragmentation, union and employers have tried to amalgamate units or create broader-based bargaining (such as at the *Toronto Star*) - thereby approximating something that the Board would routinely establish in the first instance in virtually every other industry...

...

87...In the result, the Board accepted the agreed-upon bargaining unit. Thus, in each of these cases there was either an existing pattern of departmental units or the agreement of the parties, or both...

[emphasis added]

88....Here, of course, there is no agreement on the definition of the unit and there is evidence to suggest that the unit which parties often agree to in other circumstances is not "appropriate". There is no established pattern of fragmented, departmental bargaining in this enterprise...

[emphasis added]

90. This is not to say that on the agreement of the parties, or in a newspaper, or where there is a pre-existing pattern of multi-unionism or fragmented bargaining, or where, on balance, the facts clearly warrant it, the Board might not find a departmental bargaining unit to be appropriate....

[emphasis added]

21. It is this situation, envisaged by the panel in *TV Guide*, which confronts the Board in the instant proceeding: the applicant requests that the Board find appropriate a departmental bargaining unit in circumstances where the parties have lived with a fragmented bargaining structure for over thirty years, and in the absence of any evidence that the bargaining structure has created any serious labour relations problems for the employer.

22. Finally, by way of sketching the general principles applicable to the determination of the appropriate bargaining unit, in a recent decision, *Harlequin Enterprises Limited*, [1987] OLRB Rep. Feb. 226, the Board wrote as follows:

14. The case law recognizes that the Board must determine the appropriate bargaining unit, in accordance with section 6(1) of the Act, in the circumstances of each application but that more

than one unit may well be "appropriate" in respect of a single employer: *The Board of Education for the City of Toronto, supra*; *Parnell Foods, supra*, *The Hospital for Sick Children, supra*; *National Trust, supra*. In considering the various possible bargaining unit configurations, however, the Board must be sensitive to the impact of that determination on the access by employees to self-organization: *The Board of Education for the City of Toronto, supra*; *Tip Top Tailors, supra*; *Canada Trustco, supra*. This sensitivity led the Board to acknowledge the appropriateness of bargaining units consisting of single plants within a municipality to facilitate collective bargaining in the retail industry in particular: *K Mart Canada, supra*; see also *Canada Trustco, supra*.

15. Further, the Board recognizes that a multiplicity of bargaining units generally has adverse consequences for the future bargaining relationship of the union and employer, such as, increasing the likelihood of strikes, increased complexity in administering several collective agreements, the triggering of jurisdictional disputes and employee "enclaves" coextensive with each bargaining unit: *Board of Governors of Ryerson, supra*; *The Globe and Mail Limited, supra*. Conversely, broader based units enhance administrative efficiency, employees' lateral mobility and industrial stability and provide a common framework for employment conditions: *Insurance Corporation of British Columbia, supra*; *Ontario Hydro, supra*. Where the more comprehensive unit would not operate to seriously impede or delay employee access to collective bargaining, the Board has favoured the broader grouping: *Board of Governors of Ryerson, supra*; *Stratford General Hospital, supra*. In short, the Board prefers the most comprehensive unit that is viable for labour relations purposes in the context of a policy of facilitating employee access to collective bargaining: *The Corporation of the City of Thunder Bay, supra*.

• • •

17. The concept of community of interest was a common sense acknowledgment that it generally made no labour relations sense to "lump together" groups of employees whose interests were so disparate that a bargaining agent could not readily seek to respond to employees' concerns through collective bargaining. The notion of community of interest was itself elaborated and refined into a number of constituent elements, as set out in *Usarco, supra*, including the nature of the work performed, conditions of employment, skills of employees, administration, geographic circumstances and functional coherence and inter-dependence. In *Usarco*, the Board also looked to the centralization of managerial authority, the economic factor and source of work. It must be emphasized, though, that community of interest is not an "all or nothing" phenomenon. Rather, all employees of a single employer share a basic community of interest which increases for various sub-groups of those workers. The question is not "is there a community of interest amongst the employees for whom a union seeks certification" but "is there a sufficient community of interest amongst those employees for whom certification is sought that the resulting unit is viable for collective bargaining purposes?". The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects a sufficient community of interest nexus amongst the employees to sustain collective bargaining. Thus, community of interest is not an independent, mechanical exercise but, rather, goes to the issue of viability: *Niagara Regional Health Unit, supra*; *Bestview Holdings, supra*; *Ponderosa Steak House, supra*. It is the question of viability which is paramount and that may require bargaining units defined in terms of community of interest or some broader reference where sound labour relations policy reasons so require; *The Children's Aid Society case, supra*.

19. Turning to the instant facts, the Board starts with consideration of the bargaining unit sought by the applicant to assess whether that configuration is appropriate in that the employees affected have a sufficient community of interest so that collective bargaining is viable and serious labour relations problems are not thereby created for the employer....

23. Although the approach taken by the Board in these quoted cases has been the same, we find the language used by the Board in *Hospital for Sick Children, supra*, and adopted by the Board in *Harlequin*, to be particularly expressive and explanatory of that approach: whether the bargaining unit sought by the applicant "is appropriate in that the employees affected have a sufficient community of interest so that collective bargaining is viable and serious labour relations problems are not thereby created for the employer..."

24. We are satisfied that there is sufficient community of interest amongst the employees in the computer information services department such that a bargaining unit comprised of those employees would be viable for collective bargaining purposes. Although the skills exercised by computer operators would not lead us to conclude they could form a "craft unit", those skills are still unique to the computer operators. There was no suggestion other employees of the Citizen had the skills or ability to run computer programmes, troubleshoot computer terminals and printers, and so on. The employees in the department are treated as a separate administrative unit by the employer, and hiring, firing, disciplinary matters, lines of reporting, and final wage levels (insofar as the merit component is concerned) are all done on a departmental basis. Although the four data entry people perform most of their work for the advertising department, there is little else to suggest a particular affinity between that department and computer information services. Most of the work emanating from computer information services involves providing service to other departments of the Citizen, and not to the advertising department. The department is a computer servicing department, as its title suggests, servicing the entire operation with respect to its computer terminals and the need for computer services. Interchange of employees between this department and other departments of the Citizen has occurred only rarely and intermittently, and when it has occurred such interchange was not predominantly between advertising and this department.

25. In our view there is both a sufficient and strong community of interest on which to establish viable collective bargaining between the applicant (on behalf of the employees in this department) and the respondent. The employees in question may well have a community of interest with other groups of employees at the Citizen, and a differently described bargaining unit might in other circumstances be found to be appropriate, but we are satisfied that the employees in the bargaining unit sought exhibit the necessary community of interest.

26. We turn next to consider whether serious labour relations difficulties will attend a finding that the unit applied for is appropriate. As noted, there is no evidence that the Citizen has suffered labour relations difficulties in dealing with its existing bargaining structure for a period of over thirty years. The potential ills occasioned by a fragmented bargaining structure, as referred to and discussed in the cases cited above, do not appear to have occurred at the Citizen. Indeed, the Citizen itself chose, as was its undeniable right, to deal with a *more* fragmented bargaining structure when it declined to merge the fleet control agreement into the main agreement with the Guild. In his submissions, counsel for the respondent justifiably noted that parties cannot be automatically bound by positions they have taken in the past; more specifically, counsel submitted that the fact the Citizen had agreed to departmental bargaining units in the past ought not to cause the Board to hold it to that position. While we agree with that submission, and while the respondent is not bound by positions it has taken in the past, it is certainly bound by the reality of the bargaining structure which those positions have created. Whatever the reason for the prior agreements between the parties accepting departmental bargaining units, the fact remains that the Citizen has dealt with seven bargaining units for a significant period of time, with no evidence that any labour relations difficulties, serious or minor, have resulted from this fragmented structure. The Board's general concern with fragmentation must be assessed in light of the lack of evidence or suggestion that fragmented bargaining at the Citizen has presented any serious problems. The excerpts from *TV Guide* (see paragraph 20 above), are consistent with our view that where actual evidence is available of how a fragmented bargaining structure has operated over a significant period of time, the Board will look to that experience for guidance. A concern in principle with fragmented bargaining must be assessed in light of the pre-existing fragmented bargaining structure.

27. The Board dealt with a similar situation in *The Sault Star, A Division of Southam Inc.*, [1983] OLRB Rep. June 980. In that certification proceeding there existed four bargaining units at

the time of the application. Two groups of employees remained unrepresented, and the parties agreed that the bargaining unit applied for, representing only one of those groups, was appropriate. As the Board stated in paragraph 8 of that decision:

8. In the instant application, it appears that the majority of the respondent's employees are represented in collective bargaining and that to issue a certificate for the proposed bargaining unit would not cause any of the concerns expressed by the Board in *The Spectator, A Division of Southam Inc.*, *supra*. The alternative would be to appoint a Labour Relations Officer, with the attendant delay and expense to the parties, and with no indication that the appropriate bargaining unit would be any different from the presently proposed bargaining unit. The representations of the parties on the history of collective bargaining at the newspaper do not indicate that the present arrangement of bargaining rights is unworkable or that the addition of collective bargaining with respect to the proposed bargaining unit would change the existing situation.

28. In the instant case, there is nothing to suggest that further fragmentation, by the creation of eight bargaining units instead of the existing seven, will in any way engender serious labour relations difficulties, be they premised upon fragmentation or other concerns. Indeed, whatever unit the Board finds appropriate would create an eighth bargaining unit. The respondent's alternative submission, that the appropriate unit consist of the computer information services department and the advertising department, could itself lead to nine bargaining units, with the balance of unrepresented employees comprising a ninth bargaining unit (at least) when or if they desire to be represented by a union.

29. Finally, we do not consider that organizing has reached such a stage at the Citizen that a tag-end unit is necessary. The concept of a tag-end unit was explained by the Board in *Resco Chemicals & Colours Ltd.*, [1986] OLRB Rep. Apr. 544:

22. We have considered the alternatives and the parties' representations and have concluded that the better balance is struck by our adopting the approach taken by the Board in *B. F. Goodrich* - although we do *not* adopt its terminology. A "tag-end unit", as the name suggests, is ordinarily the last bargaining unit, encompassing all unrepresented employees and fashioned in terms which will ensure no further fragmentation of the bargaining structure. There is only *one* "tag-end unit". There is not a "tag-end" unit corresponding to each existing bargaining unit. By its very terms, a tag-end unit may include a diverse grouping of employees with no strong community of interest with each other. The suggestion that there can be a "tag-end" to each of the generic or existing bargaining units would double the number of potential bargaining units in any enterprise and raise the very spectre of fragmentation that the notion of a "tag-end" was designed to avoid. We repeat: there can be only one tag-end unit.

Given the long history of departmental, multi-unit bargaining, and the remaining categories of unorganized employees, we are not disposed to find that the point has been reached when a tag-end unit is appropriate. The Citizen itself, albeit in its alternative submission, takes the same view.

30. For the above noted reasons, we find that a bargaining unit composed solely of employees of the computer information services department of the respondent is appropriate for collective bargaining.

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**0023-82-R United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030, Applicant v. Richard D. Steele Construction (1979) Ltd., Respondent**

**Bargaining Rights - Certification - Construction Industry - Reconsideration - Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent - Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees - Whether Board should revoke or amend prior certificate - Certificate revoked**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *J. P. Wilson* and *H. Kobryn*.

**DECISION OF THE BOARD;** August 11, 1987

1. The United Brotherhood of Carpenters and Joiners of America, General Workers Local Union No. 1030 (hereinafter "Local 1030") was certified pursuant to section 144(5) of the *Labour Relations Act* to represent the construction labourers employed by the respondent in the Board's geographic area #30 without reference to sector, therefore including the respondent's construction labourers employed in the industrial, commercial and institutional ("ICI") sector. Local 1030 was a newly chartered local of the United Brotherhood of Carpenters and Joiners of America (hereinafter "the United Brotherhood") and this was its first application for certification. That being the case, it was necessary for the Board to determine whether Local 1030 was a trade union within the meaning of section 1(1)(p) of the Act. It was also necessary for the Board to determine whether it was a trade union which pertains to the construction industry within the meaning of section 117(f) of the Act, since the application had been brought under the Act's construction industry provisions. While Local 1030 anticipated that a hearing would be necessary in order for the Board to make these determinations, section 102(14) of the Act gives the Board the discretion to dispose of applications for certification in the construction industry without a hearing. In this case, Local 1030 had filed with the Board the documents on which it would be relying in order to establish that it was a trade union within the meaning of the Act which pertains to the construction industry. It was implicit in those materials and in the application that Local 1030 was taking the position that it was not an affiliated bargaining agent within the meaning of clause (a) of section 137(1) of the Act. Since the application was unopposed, the Board relied on the material filed by Local 1030 and its implied assertion that it was not an affiliated bargaining agent and disposed of the application without a hearing.

2. Approximately three weeks later, Local 1030 made further applications for certification under the construction industry provisions of the Act to represent the employees of a number of companies. These applications raised the issue of whether Local 1030 was an affiliated bargaining agent. That issue was fully litigated and decided in the Board's decision in *Manacon Construction Limited*, [1983] OLRB Rep. March 407, reaffirmed in *Manacon Construction Limited*, [1983] OLRB Rep. July 1104. The Board found in those decisions that Local 1030 was an affiliated bargaining agent and that certain legal consequences flowed from that finding. These were that there was no appropriate bargaining unit which would include employees in the ICI sector in trades other than the carpenter and millwright trades for which Local 1030 could be certified; if Local 1030 wanted to make applications for certification which relate to the ICI sector, it could only make them pursuant to section 144(1) of the Act; and, since Local 1030 was an affiliated bargaining agent but not a designated employee bargaining agency, it was prevented by section 146(2) of the Act from bargaining or attempting to bargain a collective agreement or any other arrangement respecting employees employed in the ICI sector.

3. Immediately after the Board issued its first decision in *Manacon Construction*, it issued a decision in the instant application directing that the application be listed for hearing to receive the representations of the parties respecting what action, if any, the Board should take as a result of its findings in the *Manacon* decision, with respect to the legal consequences flowing from the certificate which had been issued to Local 1030 making it the exclusive bargaining agent of the respondent's construction labourers. Hearings were scheduled for this purpose but did not proceed because of the request for reconsideration of the first decision in *Manacon Construction*, *supra*. After the Board reaffirmed its decision in *Manacon Construction*, the parties eventually agreed that the Board should decide, on the basis of their written submissions, what action, if any, it should take in the instant case. This decision deals with those submissions.

4. The parties are agreed that, on the date of making up this application, the three construction labourers employed by the respondent were working within the ICI sector. They are further agreed that the parties had entered into a collective agreement following the issuing of the certificate to Local 1030.

5. Local 1030's submissions on the issues, made through its solicitors, are as follows:

The Applicant's first position in this matter is that the Board should not revoke its April 29, 1982 certificate because of a decision made in another case nearly one year later, particularly where the parties have relied on the original decision and certificate and, in fact, negotiated a collective agreement.

In this regard, we rely on the Board's comments in the *Silverwood Dairies* case - (1977) June OLRB Rep. 392, where reconsideration of a Board decision was sought on the basis that it was inconsistent with two later decided cases. They rejected the request, and stated at pages 393-394 of its decision:

"The applicant's request that the Board reconsider its earlier decision in the light of subsequent cases rests on equally doubtful ground. The legitimate need of parties involved in the collective bargaining process to rely on the finality of the determination of their rights by the Board would be ill-served, to say the least, if such settled rights must be called into question every time a different, or arguably different, decision of the Board was rendered in some subsequent case. As was stated by the Board in *The Corporation of the County of Lambton* 65 CLLC para. 16,057:

It is obvious that whatever rights an application may have to make a new application, some limit must be imposed as to the time and circumstances under which the Board should reopen and review a former decision on the grounds that in the meantime the Board has rendered another decision which appears to indicate that the Board's earlier decision may be erroneous. There must obviously be instances in the growing jurisprudence of this Board where interpretations of law and policy and finding of fact applied by the Board in earlier cases will, as a result of new arguments and experience and further consideration, be decided differently in later cases. It would, however, be too much to say that whenever the Board alters or overrules an interpretation of law or policy of finding of fact which it had followed or adopted in earlier cases, that it must or should in all events, review and reopen all such earlier cases whatever the circumstances or the length of time which may have elapsed in the meantime. In the courts the fact that the law as applied in an earlier judgment in another case is later overruled by a higher court in another case, does not afford, on that basis alone, a ground for allowing a litigant in the former case leave to appeal where the time prescribed by the rules therefore has expired. (See *Re Blackwell* (1962) D.L.R. (2d) 369.)"

We also refer to the decision of the Board in the *Monte Carlo Carpentry* case (1982) June OLRB Re. 914. In that case, Labourers' Local 183 was certified. Due to the Board's administrative error, a competing timely certification application filed by the Carpenters' Union was not processed. When the Carpenters' Union realized the mistake, it requested the Board reconsider

the Local 183 certificate. The Board refused, emphasizing the need for finality in this decision and the reliance placed upon the Board's decision in that case by Local 183.

It is therefore submitted that the Board ought not to interfere with the April 29, 1982 certificate issued to the Applicant in this matter.

Alternatively, if the Board is to interfere with the certificate, we submit that the appropriate course of action would be to exclude the ICI sector of the construction industry from the certificate. As the Board held in the *Rolland Duquette Construction* case (Board File No. 1081-83-R, Unreported decision dated November 8, 1983) there is no impediment to the Applicant, Local 1030, becoming certified and entering into a collective agreement for other than Millwrights in any sector other than the ICI sector. It is therefore submitted, in the alternative, that an appropriate balancing of interests in this case would be to amend the certificate by exempting the ICI sector.

6. With respect to Local 1030's first position, the Board's decisions in *Silverwood Dairies* and *Monte Carlo* are distinguishable on their facts and circumstances from the instant one. Each was a decision in which the Board refused requests to reconsider a prior decision. In the *Monte Carlo* decision, the Board was being asked to reconsider a decision certifying the Labourers' International Union of North America, Local 183 (hereinafter "Local 183") to represent certain employees of Monte Carlo. Like the instant case, the Board's certificate had issued without a hearing. Two days prior to the terminal date of Local 183's application and a week prior to the Board's decision issuing, a sister local of Local 1030 had filed a competing application for certification. That application did not get processed as a result of an administrative error by the Board. Had it been processed and had the two applicants been able to demonstrate that not less than 45 per cent of Monte Carlo's employees were members of the respective applicants, the Board would have directed the taking of a representation vote. The error was not disclosed until some eight months after Local 183 had been certified. In that time, Local 183 had persistently pursued its bargaining rights flowing from the certificate. Since the local of the United Brotherhood was responsible for carriage of its application, and therefore in a position to protect its interests, but had done nothing for eight months, the Board held that the better balancing of the interests of the parties to the two applications would result from the Board refusing to vary or revoke its decision certifying Local 183, thus leaving its bargaining rights undisturbed. In *Silverwood Dairies*, the Board had had the benefit of the parties' submissions on the issue relied upon by the two parties seeking reconsideration and those submissions had been considered fully by the Board in its original decision. Thus the Board saw the requests for reconsideration to be an appeal to reopen the case and reconsider arguments already made, which was "...not the purpose or intention of section [106(1)] of the Act." But beyond that concern and more to the point for the instant case, even if the request for reconsideration were not inappropriate, the Board took the position that it would have denied the request because it was satisfied that there was nothing in the two later decided cases which would cause it to change its view of the proper disposition of the [*Silverwood Dairies*] case. Furthermore, the effect of the Board's original decision had not been to authorize either party to do something which in fact was contrary to any provisions of the *Labour Relations Act*, as was the result of the Board's decision in the instant case.

7. Local 1030 clearly has relied on its certificate to enter into a collective agreement with the respondent. That certificate issued without the Board having had the benefit of the parties' submissions on the question of whether Local 1030 was an affiliated bargaining agent and on the implied assertion of Local 1030 that it was not an affiliated bargaining agent. The *Manacon* decision found that Local 1030 was an affiliated bargaining agent and, as such, could not represent in the ICI sector persons and trades other than the trades of carpenters or millwrights. Of even greater significance for this case is the fact that the Board also found that it was unlawful for Local 1030 to enter into any collective agreement or other arrangement respecting employees in the ICI

sector. That immediately made its collective agreement with the respondent unlawful insofar as it purported to apply to the ICI sector. Therefore, the Board's decision certifying Local 1030 purported to authorize Local 1030 to do something which it could not lawfully do; that is negotiate a collective agreement for the respondent's construction labourers which related to the ICI sector.

8. With respect to Local 1030's alternate position that the Board should amend the certificate to exclude the ICI sector from the certificate making Local 1030 the bargaining agent for the respondent's construction labourers employed in sectors other than ICI, on the facts of this case, there is no appropriate bargaining unit of construction labourers in sectors other than the ICI sector because none of the respondent's construction labourers were employed outside of the ICI sector on the date of making of this application. Local 1030 originally had sought to bring the application under section 144(5) of the Act which reads as follows:

Notwithstanding subsections (1) and (4), a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf.

The effect of the *Manacon* decisions is that Local 1030 cannot bring applications under that provision of the Act. Since it is an affiliated bargaining agent, if it wants to bring an application for certification which relates to the ICI sector it must do so under section 144(1), and, if it wants to bring one which relates to sectors other than ICI, it must do so under section 144(3). (*Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195). Section 144(3) states:

Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

Section 144(3) of the Act clearly deals with persons employed in sectors other than the ICI sector. The agreed facts here are that the three persons employed by the respondent on the date of making of Local 1030's application were employed in the ICI sector. Therefore, even were the Board to consider the application as having been made under section 144(3), there was no unit of the respondent's constructions labourers which would have been appropriate for collective bargaining.

9. Therefore, having regard for the findings of the Board in the *Manacon* decisions, the Board herein is satisfied that Local 1030 can make an application for certification which relates to the ICI sector of the construction industry only pursuant to section 144(1) of the Act, thus precluding it from applying on behalf of trades other than carpenter or millwright, and, since it is an affiliated bargaining agent but is not a designated employee bargaining agency, section 146(2) of the Act makes it unlawful for Local 1030 to make or attempt to make a collective agreement for employees of the respondent in the ICI sector. In the result, the Board is satisfied that there was no unit of the respondent's construction labourers which was appropriate for collective bargaining at the time Local 1030 made its application for certification.

10. The Board finds it appropriate in all of these circumstances to exercise its discretion under section 106(1) of the Act to reconsider and vary or revoke its decision certifying Local 1030 as bargaining agent of the respondent's construction labourers. Therefore the Board directs that Local 1030 and the respondent return forthwith to the Registrar their copies of the certificates issued to Local 1030.

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**0736-87-R Ontario Secondary School Teachers' Federation, Applicant v. Wellington County Board of Education, Respondent**

**Certification - Pre-Hearing Vote - Pre-hearing vote for occasional teachers to be conducted by poll with notice to be given by mail - Respondent ordered to provide mailing labels to Board for all persons on voters' list to facilitate notification - Respondent also ordered to provide applicant with the names and addresses of those on voters' list, either in the form of mailing labels, as requested by the applicant, or in any other convenient form**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

**DECISION OF THE BOARD; July 23, 1987**

1. This is an application for certification under the *Labour Relations Act* R.S.O. 1980, c. 228, as amended ("the Act") with respect to a unit of occasional teachers. It was filed June 11, 1987. Before entering into a hearing of the application on the merits, we raised with representatives of the applicant and respondent our concern (arising out of our experience with the nature of occasional teacher employment) about whether several days' posting in schools of the Form 6 Notice to Employees was adequate notice of this application to the employees affected by it. We noted the Board's routine practice in occasional teacher applications involving pre-hearing representation votes of ensuring that all occasional teachers eligible to vote are given mailed notice of the vote and of the opportunity of a hearing on the merits before any of the issues described in subsection 9(4) of the Act is determined. We invited the applicant and respondent to consider and respond to our concern whether the affected employees had adequate notice of this application and, if not, to give us their submissions as to how adequate notice should be given.

2. After considering the matter, the applicant indicated it wished to amend its application to request that a pre-hearing vote be conducted. The respondent indicated that it consented to the amendment. No other interested party having opposed the request, the application is so amended. On consent of the parties, their meeting thereafter with a Labour Relations Officer and the officer's report thereon shall serve in place of the meeting and report ordinarily directed after a pre-hearing vote application is filed.

3. The parties agree that the appropriate bargaining unit, and hence the voting constituency for the purpose of any pre-hearing representation vote, should be described as follows:

all occasional teachers employed by the respondent in its secondary panel in Wellington County, save and except employees in bargaining units for which any trade union held bargaining rights as of June 11, 1987.

While we do not determine the proper description of the appropriate bargaining unit at this stage, we do note the observations of the Board in *The Board of Education for the City of Hamilton*, [1987] OLRB Rep. June 847 at paragraphs 11 and 12:

11. ... While the parties have agreed that the bargaining unit description should include the words "save and except employees in bargaining units for which any trade union held bargaining rights as of May 19, 1987" (the application date), the panel which ultimately disposes of that issue may wish to consider the propriety of including those words. It is true that, to date, such words have almost invariably been included in the description of occasional teacher bargaining units, as the Board noted in *Carleton Roman Catholic Separate School Board*, [1987] OLRB Rep. Jan. 18 at paragraph 19:

The customary description of an occasional teacher bargaining unit expressly excludes "employees in bargaining units for which any trade union held bargaining rights as of [the application date.]" That language was originally adopted to satisfy concerns that school boards had about making distinctions between occasional teachers and teachers covered by Bill 100. Strictly speaking, this exclusionary language is unnecessary for that purpose, since "occasional teachers" are not "teachers" as that term is currently defined in Bill 100.

The Board went on in that paragraph to note that:

It is important to remember, however, that that exclusion (whether by express language or by operation of Bill 100 and subparagraph 2(f) of the *Labour Relations Act*) only applies to a teacher in respect of employment which falls within the scope of Bill 100. In respect of employment to teach as a substitute for a permanent, probationary or temporary teacher in the circumstances described in clause 1(1)(3) of the *Education Act*, a teacher is an occasional teacher and falls within the customary occasional teacher bargaining unit description even if, during other hours of the week, he or she is engaged by the same school board in employment which falls within the scope of Bill 100.

Having regard to the way in which the issues developed in that particular case, it may that the addition of the words in question is not only unnecessary but also potentially misleading to those who may not understand the point made in the latter half of the paragraph just quoted. Because of this possibility of misunderstanding, the Board may wish to reconsider its current practice.

12. There is no suggestion that occasional teachers employed as such by the respondent fell within any bargaining unit for which a trade union held bargaining rights as of the date of this application. If any of the parties wishes the Board to include the words "save and except employees in bargaining units for which any trade union held bargaining rights as of May 19, 1987" in the final bargaining unit description, they should include their representations in support of that request in the statement of desire they file after receiving notice of the Returning Officer's report on the conduct of the vote. If no such representations are received by the Board, it will be assumed that this request has been abandoned by the parties.

We adopt these observations and add that any representations on this subject should indicate whether the party making them is of the view that any occasional teacher *as such* fell within a bargaining unit for which a trade union held bargaining rights on the application date. As the question whether the proposed exclusionary language should be used in bargaining unit descriptions remains unsettled, we will retain it for the purpose of defining the voting constituency. The meaning we attach to those words, however, is as indicated in the passage quoted earlier. Accordingly, we determine that the voting constituency for the purpose of any pre-hearing representation vote in this matter shall be:

all occasional teachers employed by the respondent in its secondary panel in Wellington County, save and except employees in bargaining units for which any trade union held bargaining rights as of June 11, 1987.

In this context, the phrase "occasional teacher" has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, R.S.O. 1980, C.129, as amended.

4. Upon an examination of the records of the applicant and the respondent, it appears to the Board that not less than thirty-five percent of the employees of the respondent in the voting constituency were members of the applicant at the time the application was made. The Board therefore directs that a pre-hearing representation vote be taken of the employees of the respondent in the voting constituency described above.

5. All employees of the respondent in the voting constituency on June 25, 1987, who are

employees in the voting constituency on the date of the vote will be eligible to vote. (With respect to the question of who may be an "employee in the voting constituency" in the context of an application involving occasional teachers, see *Board of Education for the City of York*, [1985] OLRB Rep. May 767; *The Board of Education for the City of Scarborough*, [1987] OLRB Rep. Jan. 119; and *The Board of Education for the City of Hamilton*, *supra*.) Voters will be asked whether they wish to be represented by the applicant in their employment relations with the respondent.

6. In accordance with the Board's current practice, the vote will be conducted by poll, but notice to employees of the taking of the vote will be given both by postings in the respondent's schools and by mail to the persons named on the voters' lists prepared by the parties. The respondent shall provide the Board with two sets of mailing labels (one for the notice of taking of vote and one for the subsequent notice of Returning Officer's report) containing the names and last addresses known to the respondent of all of the persons on the voters' lists. The applicant may also (but is not required to) supply two sets of mailing labels with respect to any or all of the persons on the voters' list. If the addresses on the applicant's and respondent's labels for any person differ, notices will be sent to both addresses. The parties have agreed to a vote date in late September or early October 1987. Mailing labels for the purpose of notice to employees are to be supplied by August 14, 1987. Notices are to be mailed to employees no earlier than the first week of September 1987.

7. The officer's report records that the applicant takes the position that it ought to also receive a set of mailing labels for persons on the voters list. The applicant is entitled to the names and addresses: *York Board of Education*, [1985] OLRB Rep. May 767; *Scarborough Board of Education*, [1986] OLRB Rep. Mar 361. The submission that these ought to be supplied to the union in the form of address labels is novel. We direct that the respondent shall provide the applicant with the names and addresses of the persons on the mailing list, either in the form of mailing labels or in the form of photocopies of the labels submitted to the Board or in whatever other form is most convenient to the respondent, by August 14, 1987.

8. The respondent takes the position that this application should not be entertained by the Board because the applicant filed a previous application within the last two months for the same bargaining unit, and this previous application was withdrawn after the applicant reviewed the list. The respondent requests that the ballot box be sealed at the conclusion of this vote in order for it to have opportunity to make its representations in this respect at a later hearing before the Board. While the circumstances recited have not ordinarily resulted in the Board exercising its discretion under clause 103(2)(i) of the Act to refuse to entertain a subsequent application, that decision is not made at this stage. Unless in the meantime the respondent abandons its submission that this application should not be entertained, the ballot box shall be sealed and the ballots cast shall not be counted until further order of the Board.

9. The matter is referred to the Registrar.

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## CASE LISTINGS JULY 1987

	PAGE
1. Applications for Certification .....	185
2. Applications for First Contract Arbitration .....	201
3. Applications for Declaration of Related Employer.....	201
4. Sale of a Business .....	201
5. Union Successor Rights .....	202
6. Applications for Declaration Terminating Bargaining Rights.....	202
7. Applications for Declaration of Unlawful Strike .....	203
8. Complaints of Unfair Labour Practice .....	203
9. Applications for Consent to Prosecute.....	207
10. Applications for Consent to Early Termination of Collective Agreement .....	207
11. Jurisdictional Disputes.....	207
12. Complaints Under the Occupational Health & Safety Act .....	207
13. Construction Industry Grievances .....	208
14. Applications for Reconsideration of Board's Decision .....	210



## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1987

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**0026-85-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Northern & Central Gas Corporation Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all senior construction inspectors and junior construction inspectors of the respondent in and out of North Bay, Ontario" (31 employees in unit)

**2218-86-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Future Care Limited (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

**2372-86-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. VME Equipment of Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Guelph save and except supervisors, persons above the rank of supervisor, office staff and sales staff" (231 employees in unit) (*Having regard to the agreement of the parties*)

**3076-86-R:** United Steelworkers of America (Applicant) v. A.W.L. Steego (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (51 employees in unit) (*Having regard to the agreement of the parties*)

**3130-86-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Norwich (Respondent)

Unit: "all employees of the respondent in the Township of Norwich, save and except foremen and persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (33 employees in unit)

**3207-86-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Sinclair Welding Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Intervener #2)

Unit #1: "all construction labourers in the employ of the respondent engaged in the erection and finishing of precast concrete products in the industrial, commercial and institutional sector of the construction industry in

the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent engaged in the erection and finishing of precast concrete products in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foreman and persons above the rank of non-working foreman" (10 employees in unit)

**3388-86-R:** Ottawa Newspaper Guild, Local 205, The Newspaper Guild (Applicant) v. The Ottawa Citizen, division of Southam Inc. (Respondent)

Unit: "all employees of the respondent in its Computer Information Service Department in the City of Ottawa, save and except supervisors and persons above the rank of supervisor" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3427-86-R:** Labourer's International Union of North America, Local 183 (Applicant) v. C. D. Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**3443-86-R:** Ontario Public Service Employees Union (Applicant) v. Sudbury Algoma Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent at Sudbury save and except supervisors and persons above the rank of supervisor, Personnel Services department employees, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods and employees in bargaining units for which any trade union held bargaining rights as of March 19, 1987" (41 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0046-87-R:** United Steelworkers of America (Applicant) v. Orangerooft of Canada (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent at the Howard Johnson Toronto East Hotel, 40 Progress Court in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, front desk personnel, security guards, persons employed under short-term Government Training Programs, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods" (67 employees in unit) (*Clarity Note*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

**0086-87-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. B & Brothers Cement Finishing Contractors (1987) Ltd., and Rite Forming Ltd. (Respondents)

Unit #1: "all construction labourers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Unit #2: "all construction labourers in the employ of the respondents in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

**0211-87-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Menkes Developments Inc. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (42 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman, and persons covered by subsisting collective agreements, certificates of the Ontario Labour Relations Board, or written voluntary recognition agreements" (42 employees in unit)

**0382-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Hi-Road Earthmoving Inc. (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0549-87-R:** Amalgamated Clothing & Textile Workers Union, Toronto Joint Board (Applicant) v. Able Plastics Limited (Respondent)

Unit: "all employees of the respondent in the City of Brampton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (94 employees in unit) (*Having regard to the agreement of the parties*)

**0551-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. D.S.L. Structural Ltd. (Respondent)

Unit: "all employees of the respondent engaged in concrete forming on residential building projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen, persons above the rank of non-working foreman and employees in bargaining units for which any trade union held bargaining rights as of May 25, 1987" (10 employees in unit) (*Having regard to the agreement of the parties*)

**0442-87-R:** Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Arbor Living Centres Inc. (Respondent)

Unit #1: "all employees of the respondent at its Chateau Park Nursing Home in Windsor, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, pharmacists, dietitians, activation director, office, clerical and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent at its Chateau Park Nursing Home in Windsor regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, pharmacists, dietitians, activation director, office, clerical and technical staff" (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0568-87-R:** Ontario Nurses' Association (Applicant) v. Caressant Care Nursing Home of Canada Limited (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in its Nursing Home in Arthur, save and except assistant Director of Nursing, persons above the rank of Assistant Director of Nursing, and persons regularly employed for not more than 24 hours per week" (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity by the respondent for not more than 24 hours per week in its Nursing Home in Arthur, save and except Assistant Director of Nursing and persons above the Assistant Director of Nursing" (2 employees in unit) (*Having regard to the agreement of the parties*)

**0578-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Custom Trim Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, office, sales and technical staff" (81 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0590-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Huron County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Huron" (51 employees in unit) (*Having regard to the agreement of the parties*)

**0629-87-R:** Ontario Secondary School Teachers, Federation (Applicant) v. Lambton County Board of Education (Respondent)

Unit: "all occasional teachers of the Lambton County Board of Education in its secondary panel in Lambton County" (167 employees in unit) (*Having regard to the agreement of the parties*)

**0634-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Seal-On Paving Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repair and maintenance of same in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit) (*Having regard to the agreement of the parties*)

**0644-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Conservatory Construction Company Ltd. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0645-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Ryan's Construction (Respondent) Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers

and similar equipment, and those primarily engaged in repairing and maintaining of same, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in repairing and maintaining same, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0646-87-R:** Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Aluminart Products Limited (Respondent)

Unit: "all employees of the respondent in Brampton, Ontario, save and except lead hands, persons above the rank of lead hand, truck drivers, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (57 employees in unit) (*Having regard to the agreement of the parties*)

**0668-87-R:** Labourers' International Union of North America (Applicant) v. Ashton Business Installations (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except office, clerical and sales staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

**0685-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Camtar Concrete Drain Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**0691-87-R:** Canadian Union of Public Employees (Applicant) v. Perth & District Union Public Library (Respondent)

Unit: "all employees of the respondent in the County of Lanark, save and except Head Librarian, persons above the rank of Head Librarian and Secretary/Treasurer" (10 employees in unit)

**0705-87-R:** United Steelworkers of America (Applicant) v. Goshen Rubber of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Brampton, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (67 employees in unit) (*Having regard to the agreement of the parties*)

**0706-87-R:** United Steelworkers of America (Applicant) v. Energetic Metals Incorporated (Respondent)

Unit: "all employees of the respondent in the Town of Fort Erie, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

**0708-87-R:** Millwright District Council of Ontario, United Brotherhood of Carpenters & Joiners of America, on behalf of Local Unions 1007, 1151, 1244, 1410, 1425, 1592, 1916 & 2309 (Applicant) v. Attic Mechanical Maintenance Ltd. (Respondent)

Unit #1: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all millwrights and millwrights' apprentices in the employ of the respondent in all sectors of the construction industry, except the industrial, commercial and institutional sector in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**0720-87-R:** London & District Service Workers' Union, Local 220 (Applicant) v. Groves Memorial Community Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Fergus, save and except supervisors, persons above the rank of supervisor, graduate and undergraduate nurses, paramedical staff, and office and clerical staff" (92 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

**0725-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Muskoka Board of Education (Respondent)

Unit: "all occasional teachers of the respondent in its secondary panel in the District of Muskoka" (27 employees in unit) (*Having regard to the agreement of the parties*)

**0730-87-R:** Ontario Nurses' Association (Applicant) v. Carewell Corporation (Canada) Ltd. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Town of Gravenhurst, save and except the Director of Care and persons above the rank of Director of Care" (5 employees in unit) (*Having regard to the agreement of the parties*)

**0739-87-R:** Ontario Public Service Employees Union (Applicant) v. Queen's Park Child Care Centre Incorporated (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the Executive Director" (17 employees in unit) (*Having regard to the agreement of the parties*)

**0767-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 498495 Ontario Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0768-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Milano General Contractor Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry, except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0770-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Collingwood Plumbing Limited (Respondent)

Unit #1: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Clarity Note*)

Unit #2: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry, except the industrial, commercial and institutional sector, in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers), and the provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Clarity Note*)

**0780-87-R:** Service Employees International Union, Local 204, affiliated with the S.E.I.U., AFL:CIO:CLC (Applicant) v. The Ontario Jockey Club (Respondent)

Unit #1: "all employees of the respondent engaged in cleaning at Fort Erie Race Track in Fort Erie, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of June 16, 1987" (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent engaged in cleaning regularly employed for not more than 24 hours per week and students employed during the school vacation period at Fort Erie Race Track in Fort Erie, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of June 16, 1987" (27 employees in unit) (*Having regard to the agreement of the parties*)

**0790-87-R:** United Brotherhood of Carpenters & Joiners, Local 2041 (Applicant) v. Torfax Drywall (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

**0792-87-R:** Graphic Communications International Union, Local 500M (Applicant) v. W.L. Smith & Associates Limited (Respondent)

Unit: "all employees of the respondent at Ajax, Ontario, save and except foremen, those above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

**0799-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Muller's Meats Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in Niagara Falls, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (55 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in Niagara Falls regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and drivers" (2 employees in unit) (*Having regard to the agreement of the parties*)

**0811-87-R:** The Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Kingston Bus for the Handicapped (Respondent)

Unit: "all employees of the respondent in Kingston, save and except manager and persons above the rank of manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0826-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Wharton Industrial Developments Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (32 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (32 employees in unit)

**0843-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Corecon Construction Limited (Respondent)

Unit #1: "all construction industry labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

**0852-87-R:** Canadian Union of Public Employees (Applicant) v. The Pollution Probe Foundation (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Executive Director, persons above the rank of Executive Director, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (31 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0855-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Continental Railings (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial

and institutional sector, save and except non-working foreman and persons above the rank of non-working foreman" (2 employees in unit)

**0871-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. 659928 Ontario Limited, c.o.b. as V.J.R. Contractors (Respondent)

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in all sectors of the constructions industry, except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0874-87-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. 412238 Ontario Limited, c.o.b. as Journey's End Motel (Respondent)

Unit #1: "all employees of the respondent in the City of Belleville, save and except Assistant Manager, persons above the rank of Assistant Manager, office and clerical staff, front desk staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Belleville regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Assistant Manager, persons above the rank of Assistant Manager, office and clerical staff, and front desk staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

**0886-87-R:** Canadian Union of Restaurant & Related Employees Hotel Employees, Restaurant Employees Union, Local 88 (Applicant) v. Cara Operations Limited (Respondent)

Unit #1: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders employed by the respondent at its Swiss Chalet Restaurant at 900 Don Mills Road in Metropolitan Toronto save and except assistant hostesses, persons above the rank of assistant hostess, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (43 employees in unit)

Unit #2: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders regularly employed by the respondent for not more than 24 hours per week and students employed during the school vacation period at its Swiss Chalet Restaurant at 900 Don Mills Road in Metropolitan Toronto, save and except assistant hostesses and persons above the rank of assistant hostess" (21 employees in unit) (*Having regard to the agreement of the parties*)

**0896-87-R:** Canadian Textile & Chemical Union (Applicant) v. Brydge Market Corporation (Respondent)

Unit: "all employees of the respondent in the County of Brant, save and except supervisors, foremen, foreladies, persons above the rank of foreman or forelady, and office and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

**0917-87-R:** United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Lightolier Canada Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Pickering, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (30 employees in unit) (*Having regard to the agreement of the parties*)

**0928-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. Heron Mechanical Limited (Respondent)

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

**0929-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Salvador Excavating Limited (Respondent)

Unit: "all employees of the respondent at Thornhill, save and except foremen, persons above the rank of foreman, office and sales staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

**0936-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ferlandi Builders Inc. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0937-87-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Humpty Dumpty Foods Limited (Respondent)

Unit: "all employees of the respondent in the City of Welland, save and except Assistant Manager and persons above the rank of Assistant Manager" (8 employees in unit) (*Having regard to the agreement of the parties*)

**0969-87-R:** Sheet Metal Workers' International Association (Applicant) v. Tony Olsen Enterprises (Respondent)

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**1024-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Mar-tek Contracting, division of 688071 Ontario Limited (Respondent)

Unit #1: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, in the Municipality of Met-

ropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**0690-87-R:** International Union of Operating Engineers, Local 796 (Applicant) v. Kellogg Salada Canada Inc. (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener)

Unit: "all employees hired and employed by the respondent as stationary engineers at 325 Humber College Blvd., Rexdale, save and except stationary engineers employed as supervisors and those above the rank of supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		5
Number of ballots marked in favour of intervener		0

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**0046-87-R:** United Steelworkers of America (Applicant) v. Orangerooft of Canada (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at the Howard Johnson Toronto East Hotel, 40 Progress Court in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, salespersons, front desk personnel, security guards and persons engaged under short-term Government Training Programs" (53 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots	32	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		15

**0185-87-R:** United Steelworkers of America (Applicant) v. Stackpole Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at 550 Evans Avenue, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (173 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		173
Number of persons who cast ballots	167	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		105
Number of ballots marked against applicant		61

**0365-87-R:** International Brotherhood of Electrical Workers, Local 586 (Applicant) v. The Hydro-Electric Commission of the City of Gloucester (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all employees of the respondent save and except foremen, persons above the rank of foreman, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (37 employees in unit)

Number of names of persons on list as originally prepared by employer		37
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Number of persons who cast ballots	26	
Number of ballots marked in favour of applicant		25
Number of ballots marked in favour of intervener		1

**0577-87-R:** Canadian Union of Public Employees (Applicant) v. The Queen Elizabeth Hospital (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical and undergraduate pharmacists, graduate and undergraduate dieticians, technical personnel, supervisors and forepersons, persons above the rank of supervisor and foreperson, chief engineers, office and clerical staff, and employees in bargaining units for whom any trade union held bargaining rights as of May 27, 1987" (191 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		192
Number of persons who cast ballots	66	
Number of ballots marked in favour of applicant		66
Number of ballots marked against applicant		0

**0595-87-R:** Service Employees International Union, Local 204, affiliated with S.E.I.U., AFL:CIO:CLC (Applicant) v. Extendicare Health Care Services Inc. (Respondent) v. Canadian Union of Operating Employees (Intervener)

Unit: "all employees of the respondent at its Extendicare/North York operation in Metropolitan Toronto regularly employed for not more than 22.5 hours per week, and students employed during the school vacation period, save and except registered nurses, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor and foreman, office staff and employees in bargaining units for which any trade union held bargaining rights as of May 29th, 1987" (80 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		80
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		35
Number of ballots marked against applicant		0

**0603-87-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Industrial Copy Centres Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (49 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		49
Number of persons who cast ballots	49	
Number of ballots marked in favour of applicant		28
Number of ballots marked against applicant		21

**Applications for Certification Dismissed Without Vote**

**0084-87-R:** United Steelworkers of America (Applicant) v. Alpa Lumber Inc. (Respondent) (62 employees in unit)

**0327-87-R:** International Brotherhood of Electrical Workers, Local 894 (Applicant) v. County Electric of Peterborough Limited (Respondent) v. Group of Employees (Objectors) (20 employees in unit)

**0494-87-R:** United Steelworkers of America (Applicant) v. Renabie Gold Mines Ltd. (Respondent) v. Group of Employees (Objectors) (136 employees in unit)

**0635-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Seal-On Paving Ltd. (Respondent) v. Group of Employees (Objectors) (3 employees in unit)

**0798-87-R:** Canadian Union of Operating Engineers & General Workers, Local 101 (Applicant) v. TDL Woodtreating Limited (Respondent) (6 employees in unit)

**0810-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of York (Respondent) (224 employees in unit)

**1098-87-R:** Ironworkers District Council of Ontario (Applicant) v. Giffin Sheet Metals Limited (Respondent) (5 employees in unit)

#### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**0007-87-R:** United Food & Commercial Workers International Union, Local 1000A (Applicant) v. Sears Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its service centre at 1920 Albion Road, Rexdale, save and except senior stockpersons, persons above the rank of senior stockperson, office and clerical staff, truck drivers, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (209 employees in unit)

Number of names of persons on revised voters' list		209
Number of persons who cast ballots	175	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		41
Number of ballots marked against applicant		133
Ballots segregated and not counted		16

**0419-87-R:** Ontario Public Service Employees Union (Applicant) v. Queen's University at Kingston (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all support staff of the respondent in the County of Frontenac save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods and employees in bargaining units for which any trade union held bargaining rights as of May 13, 1987" (545 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		545
Number of persons who cast ballots	472	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		167
Number of ballots marked against applicant		252
Ballots segregated and not counted		52

#### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0195-87-R:** Ontario Public Service Employees Union (Applicant) v. The Ontario Institute for Studies of Education (Respondent) v. The General Support Staff Association of the Ontario Institute for Studies in Education (Intervener) v. Group of Employees (Objectors)

Unit: "all office, clerical and technical employees of the respondent in Ontario, save and except supervisors and those above the rank of supervisor, secretary to the Director, secretaries to the Assistant Director of Planning and Resources, secretary to the Executive Assistant to the Director, secretary to the Assistant Director of Field Services and Research, secretary to the Assistant Director (Academic), secretary to the Chief Financial Officer, secretaries employed in Personnel and Labour Relations Departments, Benefits Administrator, casual employees, and persons regularly employed for not more than 10 hours per week and students employed during the school vacation period" (159 employees in unit)

Number of names of persons on revised voters' list		159
Number of persons who cast ballots	125	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		31
Number of ballots marked against applicant		93

**0384-87-R: Energy & Chemical Workers Union (Applicant) v. C.I.L. Inc. (Respondent)**

Unit: "all employees of the respondent located in the County of Lambton, save and except foremen and persons above the rank of foreman, laboratory staff, office and clerical staff and engineering staff" (282 employees in unit)

Number of persons on voters' list at start of vote		282
Number of persons who cast ballots	274	
Number of segregated ballots cast by persons whose names appear on voters' list	2	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		92
Number of ballots marked against applicant		179

**0467-87-R: Energy & Chemical Workers Union (Applicant) v. Menu Foods Limited (Respondent) v. Group of Employees (Objectors)**

Unit: "all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (75 employees in unit)

Number of names of persons on revised voters' list		75
Number of persons who cast ballots	75	
Number of ballots marked in favour of applicant		27
Number of ballots marked against applicant		48

**0569-87-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Findlay Greenwood Inc. (Respondent) v. Group of Employees (Objectors)**

Unit: "all office and clerical employees of the respondent in Hamilton, save and except supervisors, persons above the rank of supervisor, confidential secretary to the President, Vice-President of Finance and Chairman of the Board, personnel clerk and secretary, payroll accounting clerk, salespersons, and employees in bargaining units for which any trade union held bargaining rights as of May 27, 1987" (38 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		38
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		20

**0607-87-R: United Food & Commercial Workers International Union (Applicant) v. Valley Bottling of Canada Ltd. (Respondent) v. Group of Employees (Objectors)**

Unit: "all employees of the respondent in Cornwall, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit)

Number of names of persons on revised voters' list		22
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		13

### **Applications for Certification Withdrawn**

- 1085-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Waterloo County Board of Education (Respondent)
- 1086-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Peterborough County Board of Education (Respondent)
- 1087-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Halton Board of Education (Respondent)
- 1088-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Board of Education for the City of York (Respondent)
- 1089-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Durham Board of Education (Respondent)
- 1090-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Sault Ste. Marie Board of Education (Respondent)
- 1091-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Board of Education for the City of Toronto (Respondent)
- 1092-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Etobicoke (Respondent)
- 1093-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Peel Board of Education (Respondent)
- 1108-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Board of Education for the City of London (Respondent)
- 1109-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. North York Board of Education (Respondent)
- 1124-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. York Regional Board of Education (Respondent)
- 1222-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. East York Board of Education (Respondent)
- 1267-87-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Timmins Board of Education (Respondent)
- 1366-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Brant County Board of Education (Respondent)
- 1386-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Scarborough (Respondent)
- 2149-85-R:** Marc Dallaire, and Pierre Bourgeois (Applicants) v. Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Respondent) v. Bois A. Lachance Lumber Limited (Intervener)
- 2016-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Craftwood Co. Ltd. (Respondent)

**2107-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Valentine Enterprises Contracting (Respondent)

**2108-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Clearway Construction Limited, and Teston Pipelines Limited (Respondent)

**2110-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Bandiera & Associates Inc. (Respondent)

**2197-86-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Georgian Construction Company Limited (Respondent) v. Group of Employees (Objectors)

**2198-86-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Future Care Ltd. (Respondent)

**2310-86-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Blue Line Taxi Co. Limited (Respondent)

**2398-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Advice Pipelines Ltd. (Respondent)

**3024-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Pachino Construction Company Limited (Respondent)

**0075-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. D. Crupi & Sons Ltd. (Respondent)

**0076-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Argo Sewer & Watermain Ltd. (Respondent)

**0189-87-R:** Ironworkers District Council of Ontario (Applicant) v. P.C.L. Industrial Constructors Inc. (Respondent)

**0382-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Hi-Road Earthmoving Inc. (Respondent)

**0648-87-R:** Energy & Chemical Workers Union (Applicant) v. Serviplast Inc. (Respondent)

**0667-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Divo Construction (Respondent)

**0683-87-R:** United Steelworkers of America (Applicant) v. CCL Industries Inc. (K-G Packaging Division) (Respondent)

**0782-87-R:** United Steelworkers of America (Applicant) v. Steetley Talc Inc. (Respondent)

**0815-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Acme Building & Construction Limited (Respondent)

**0840-87-R:** Service Employees International Union, Local 204, affiliated with S.E.I.U., AFL:CIO:CLC (Applicant) v. Mini-Skools Limited (Respondent)

**0902-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Mechanical Cables Ltd. (Respondent)

**1006-87-R:** United Steelworkers of America (Applicant) v. Alumatic Limited (Respondent)

**1034-87-R:** Canadian Paperworkers Union (Applicant) v. Abitibi-Price Inc., Lakehead Woodlands Division (Respondent)

## **APPLICATIONS FOR FIRST CONTRACT ARBITRATION**

**0900-87-FC:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Skelhorns Bus Lines Limited (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER**

**2172-84-R:** Carpenters' District Council of Toronto & Vicinity on behalf of Carpenters Local Union 27, United Brotherhood of Carpenters & Joiners of America, The Ironworkers District Council of Ontario, and International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicants) v. 270915 Ontario Limited, and 556347 Ontario Limited c.o.b. as Hardrock Forming Company, Delform Construction Limited, and Ilena Construction Limited (Respondents) v. The Form Work Council of Ontario, and Labourers' International Union of North America, Local 183 (Intervener) (*Dismissed*)

**1688-86-R; 1689-86-R:** Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Normick Perron Inc. (Kirkland Lake Division), and S.G. & W. Mitchell Pulpwood Ltd. (Respondents) v. Group of Employees (Objectors) (*Withdrawn*)

**2703-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 1030 (Applicant) v. Nestreb Inc., and Elbertsen Industries Limited (Respondents) v. Labourers' International Union of North America, Local 247 (Intervener) (*Dismissed*)

**3044-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Coldmatic Refrigeration of Canada Ltd., and George Zafir Limited (Respondents) (*Withdrawn*)

**3258-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. St. Thomas Acoustics & Drywall Inc. (Respondents) (*Granted*)

**0004-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. 101769 Canada Inc., Montreal Parquetry Floors Ltd./La Cie de Parquets de Montreal Ltee. (Respondent) (*Withdrawn*)

**0108-87-R:** The Ontario Pipe Trades Council of the United Association of Journeymen & Apprentices of The Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. C & P Mechanical Services Ltd., and Soldec Mechanical Inc. (Respondents) (*Granted*)

**0663-87-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. B & Brothers Cement Finishing Contractors (1987) Ltd., and Rite Forming Ltd. (Respondents) (*Granted*)

**0965-87-R:** The Operative Plasterers and Cement Masons International Association of the United States & Canada, Local 172, Restoration Steeplejacks (Applicant) v. The B. Phillips Co. Limited, and B. Phillips Co. (1987) Limited (Respondents) (*Withdrawn*)

## **SALE OF A BUSINESS**

**3044-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Coldmatic Refrigeration of Canada Ltd., and George Zafir Limited (Respondents) (*Withdrawn*)

**0004-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. 101769 Canada Inc., Montreal Parquetry Floors Ltd./La Cie de Parquets de Montreal Ltee. (Respondent) (*Withdrawn*)

**0107-87-R:** The Ontario Pipe Trades Council of the United Association of Journeymen & Apprentices of the

Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. C & P Mechanical Services Ltd., and Soldec Mechanical Inc. (Respondents) (*Withdrawn*)

**0301-87-R:** James F. Perry (Applicant) v. International Beverage Dispensers & Bartenders Union of the Hotel & Restaurant Employees Union, Local 280 (Respondent) v. Simcoe Tavern, per Jack J. Mackness (Intervener) (*Granted*)

**0517-87-R:** International Union of Elevator Constructors, Local 90 (Applicant) v. Armor Elevator S.W. Ontario Co., division of 349528 Ontario Ltd., and Skyline Elevator Inc. (Respondents) (*Withdrawn*)

**0756-87-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Black & McDonald Limited, and Parl Estates Limited (Respondents) (*Withdrawn*)

**0964-87-R:** The Operative Plasterers' & Cement Masons International Association of the United States & Canada, Local 172, Restoration Steeplejacks (Applicant) v. The B. Phillips Co. Limited, and B. Phillips Co. (1987) Limited (Respondents) (*Withdrawn*)

## UNION SUCCESSOR RIGHTS

**0620-87-R:** Canadian Textile & Chemical Union (Applicant) v. Noodles Restaurant Inc. (Respondent) (*Granted*)

**0621-87-R:** Canadian Textile & Chemical Union (Applicant) v. Windsor Arms Hotel Limited (Respondent) (*Granted*)

**0622-87-R:** Canadian Textile & Chemical Union (Applicant) v. Windsor Arms Hotel Limited (Respondent) (*Granted*)

**0623-87-R:** Canadian Textile & Chemical Union (Applicant) v. Windsor Arms Hotel Limited (Respondent) (*Granted*)

**0626-87-R:** Canadian Textile & Chemical Union (Applicant) v. Edwards Books & Art Limited (Respondent) (*Granted*)

**0627-87-R:** Canadian Textile & Chemical Union (Applicant) v. The Children's Book Store Limited (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0014-87-R:** International Beverage Dispensers & Bartenders Union of the Hotel & Restaurant Employees & Bartenders International Union (Applicant) v. 694983 Ontario Ltd., c.o.b. as Tool Box (Respondent) (*Dismissed*)

**0219-87-R:** Lise Bergeron (Applicant) v. Canadian Union of Public Employees (Respondent) (*Dismissed*)

**0272-87-R:** Charlene Banwait, Balbir Kler, Sarbjit Sidhu, et al. (Applicants) v. Laundry & Linen Drivers & Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Easy Enterprises Inc. (Intervener) (*Dismissed*)

**0378-87-R:** Paul Collingswood (Applicant) v. Canadian Union of Public Employees (Respondent) v. Victoria University (Intervener) (*Dismissed*)

**0432-87-R:** Mohinder Gill (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC

(Respondent) v. ABC Taxi (Brockville) Ltd., and Safedrive Inc. c.o.b. as City Cab (Interveners) v. Group of Employees (Objectors) (*Dismissed*)

**0434-87-R:** Richard Millward (Applicant) v. Canadian Brotherhood of Railway, Transport & General Workers (Respondent) v. Canadian Mini-Warehouse Properties Limited (Intervener) (28 employees in unit) (*Granted*)

**0534-87-R:** Terry Fraser (Applicant) v. United Plant Guards, Local 1962 (Respondent) v. York University (Intervener) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**1005-87-U:** Continental Can Canada Inc. (Applicant) v. J. G. Bertuello, P. Bogler et al. (Respondents) (*Withdrawn*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2407-83-U:** Mikko Vesa, Ronald Pruys and Garrett Kruger (Complainants) v. International Brotherhood of Electrical Workers, Local 402 (Respondent) v. D. R. McCormick Electric Ltd. (Employer) (*Dismissed*)

**1336-84-U; 2435-84-U; 2840-84-U:** Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Miracle Feeds (division of Ogilvie Mills Ltd.), 571591 Ontario Inc., c.o.b. as Idealease (London), and 571591 Ontario Inc., c.o.b. as Custom Contract Drivers (Respondents) (*Withdrawn*)

**1586-85-U:** Marc Dallaire et Pierre Bourgeois (Complainant) v. Lumber & Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America, Raymond Boissonneault et Normand Rivard (Respondents) (*Withdrawn*)

**1692-85-U:** John Daniell (Complainant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) (*Dismissed*)

**0372-86-U:** Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Miracle Feeds (division of Ogilvie Mills Ltd.), Idealease (London) Ltd., 571591 Ontario Inc. c.o.b. as Custom Contract Drivers, Paul Martin, and Elgin Cartage c.o.b. as Maple Leaf Driving Pool (Respondents) (*Withdrawn*)

**0447-86-U:** International Union of Operating Engineers, Local 793 (Complainant) v. William Kutynec Excavating & Grading Limited, c.o.b. as Williams Contracting (Respondent) (*Granted*)

**1643-86-U:** Frank Strutt (Complainant) v. United Steelworkers of America, Local 14994 (Respondent) v. Domtar Construction Materials (Intervener) (*Dismissed*)

**1687-86-U:** Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Normick Perron Inc. (Kirkland Lake Division), and S.G. & W. Mitchell Pulpwood Ltd. (Respondent) (*Withdrawn*)

**2249-86-U:** Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Locals 493 and 527 (Complainant) v. Future Care Ltd. (Respondent) (*Withdrawn*)

**2275-86-U:** Labourers' International Union of North America, Local 506 (Complainant) v. Georgian Construction Company Limited (Respondent) (*Withdrawn*)

**2354-86-U:** Domenic Gattellaro (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 222 (Respondent) v. Cadbury Canada Marketing Inc. (Intervener) (*Dismissed*)

**2602-86-U:** United Rubber, Cork, Linoleum & Plastic Workers of America, Local 73 (Complainant) v. Epton Industries Inc. (Respondent) (*Withdrawn*)

**2614-86-U:** Teamsters Local Union No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. The Derby Pet Foods Ltd. (Respondent) (*Withdrawn*)

**2743-86-U:** Labourers' International Union of North America, Local 506 (Complainant) v. The Georgian Development Corporation, Gabriele Spoleitini, and Gene Maida (Respondents) (*Withdrawn*)

**3139-86-U:** Metropolitan Toronto Sewer & Watermain Contractors Association in its Own Right and on behalf of its Member Contractors (Complainant) v. A Council of Trade Unions acting as Representative & Agent of Teamsters Local Union 230 & Labourers' International Union of North America, Local 183, Teamsters Local 230 & Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

**3381-86-U:** Daniel A. Goy (Complainant) v. International Brotherhood of Electrical Workers, Local 894, Oshawa, R.G. Hill BM/FS and Dave Dunningham ABM (Respondents) v. Electrical Power Systems Construction Association (Intervener #1) v. EBEW Electrical Power Systems Construction Council of Ontario (Intervener #2) (*Withdrawn*)

**3402-86-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. C.P. Fisheries Ltd. (Respondent) (*Withdrawn*)

**3503-86-U:** Labourers' International Union of North America, Local 183 (Complainant) v. Crossville Woods Inc., and Weslodge Holdings Inc. (Respondents) (*Withdrawn*)

**3556-86-U:** London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. London Soap Company Limited (Respondent) (*Withdrawn*)

**3558-86-U:** Labourers' International Union of North America, Local 247 (Complainant) v. Manpower Temporary Services, division of Fosscot Limited (Respondent) (*Withdrawn*)

**0015-87-U:** International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Complainant) v. 694983 Ontario Ltd., c.o.b. as Tool Box, and Jack Mackness (Respondents) (*Granted*)

**0113-87-U:** The Canadian Union of Public Employees & its Local 1144 (Complainant) v. St. Joseph's Health Centre (Respondent) (*Withdrawn*)

**0152-87-U:** Hotel Employees Restaurant Union, Local 75 (Complainant) v. Landmark Motor Inn (Respondent) (*Withdrawn*)

**0153-87-U:** The Energy & Chemical Workers Union (Complainant) v. Rollit Products Ltd. (Respondent) (*Withdrawn*)

**0165-87-U:** Terry Fraser, Nigel Edwards et al. (Complainants) v. United Plant Guards, Local 1962 (Respondent) (*Withdrawn*)

**0311-87-U:** London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Complainant) v. London Soap Company Limited (Respondent) (*Withdrawn*)

**0323-87-U:** Canadian Paperworkers' Union, Locals 35, 84 & 101 (Complainants) v. Ontario Paper Company (Respondent) (*Withdrawn*)

**0349-87-U:** United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. Robert Hunt Corporation (Respondent) (*Withdrawn*)

**0352-87-U:** Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. The Derby Pet Foods Limited (Respondent) (*Withdrawn*)

**0354-87-U:** Energy & Chemical Workers Union (Complainant) v. Rollit Products Ltd. (Respondent) (*Withdrawn*)

**0363-87-U:** Labourers' International Union of North America, Local 1059 (Complainant) v. B & Brothers Cement Finishing Contractors Ltd. (Respondent) (*Withdrawn*)

**0372-87-U:** International Association of Machinists & Aerospace Workers, Local 268, International Brotherhood of Electrical Workers, Local 914, United Association of Plumbers & Steamfitters, Local 666, International Union of Operating Engineers, Local 232, United Brotherhood of Carpenters & Joiners of America, Local 2737 (Complainants) v. Ontario Paper Company Limited (Respondent) (*Withdrawn*)

**0462-87-U:** Richard Lachapelle et al. (Complainant) v. Warehousemen, Transportation & General Workers' Union, Local 715 of the Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Respondent) (*Withdrawn*)

**0470-87-U:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Gerry Lowrey Ltd. (Respondent) (*Dismissed*)

**0520-87-U:** Service Employees International Union, Local 204 (Complainant) v. The Runnymede Hospital (Respondent) (*Withdrawn*)

**0521-87-U:** Dave Travino, Luc Boyer, Gordy-Currie (Complainants) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 371 (Respondent) (*Withdrawn*)

**0529-87-U:** Anna Nasata (Complainant) v. Precious Plate Ltd. (Respondent) (*Withdrawn*)

**0554-87-U:** Edmund A. Thistle (Complainant) v. C. Borrows (Respondent) (*Withdrawn*)

**0589-87-U:** William E. Campbell (Complainant) v. Canadian Union of Public Employees, Local 44 (Respondent) (*Withdrawn*)

**0591-87-U:** Alayna L. Keiller (Complainant) v. Canadian Brotherhood of Railway, Transport & General Workers (Respondent) (*Withdrawn*)

**0611-87-U:** Stella Keast (Complainant) v. Kenora-Patricia Child & Family Services (Respondent) (*Withdrawn*)

**0612-87-U:** Stella Keast (Complainant) v. Canadian Union of Public Employees Representative Eileen Okerlund (Respondent) (*Withdrawn*)

**0617-87-U:** Stanley Schiff (Complainant) v. United Steelworkers of America, Local 3252 (Respondent) (*Withdrawn*)

**0655-87-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Ontario Engineered Suspension Blenheim Ltd. (Respondent) (*Withdrawn*)

**0659-87-U:** V. Patterson, N. Robinson, S. Lynch (Complainants) v. Canadian Union of Operating Engineers & General Workers (Respondent) (*Withdrawn*)

**0675-87-U:** Manouk Kalagian (Complainant) v. Foster Wheeler Ltd. of St. Catharines (Respondent) (*Withdrawn*)

- 0703-87-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. Walkley I.G.A. (Respondent) (*Withdrawn*)
- 0714-87-U:** Bruno Succi (Complainant) v. Ken Yurchuck (Chief Union Steward) (Respondent) (*Withdrawn*)
- 0724-87-U:** Melvin Hiscock (Complainant) v. Copeland Canada (Respondent) (*Withdrawn*)
- 0727-87-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Presteve Foods Limited (Respondent) (*Withdrawn*)
- 0733-87-U:** United Food & Commercial Workers Union, Local 175 (Complainant) v. Loblaws, division of Westfair Foods (Respondent) (*Withdrawn*)
- 0743-87-U:** Hotel Employees, Restaurant Employees Union Local 75 (Complainant) v. Westfort Hotel Ltd. (Respondent) (*Withdrawn*)
- 0779-87-U:** Robert Popwell (Complainant) v. City of Toronto Operations, and C.U.P.E., Local 43 (Respondents) (*Withdrawn*)
- 0783-87-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. 649857 Ontario Ltd., c.o.b. as Jerry Liddle Fishery, and 649585 Ontario Inc., c.o.b. as Jack Liddle Fishery (Respondents) (*Withdrawn*)
- 0795-87-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. James Taylor Fishery Ltd. (Respondent) (*Withdrawn*)
- 0812-87-U:** Delmer Dorey (Complainant) v. Teamsters Local Union 230 (Respondent) (*Withdrawn*)
- 0836-87-U:** Lyn Vosbough (Complainant) v. International Beverage Dispensers' & Bartenders Union, Local 280 (Respondent) (*Withdrawn*)
- 0839-87-U:** Ontario Nurses' Association (Complainant) v. General Motors of Canada Limited (Respondent) (*Withdrawn*)
- 0845-87-U; 0846-87-U:** United Food & Commercial Workers International Union, AFL:CIO:CLC, Local 1230 (Complainant) v. Keve Services Ltd., c.o.b. as First Choice Haircutters (Respondent) (*Withdrawn*)
- 0863-87-U:** Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation #165, and Basil Doobay (Respondents) (*Withdrawn*)
- 0873-87-U:** The United Brotherhood of Carpenters & Joiners of America, General Workers' Union, Local 1030 (Complainant) v. Zenith Wood Turners Inc./Labelle Series 148620 Canada Inc. (Respondent) (*Withdrawn*)
- 0887-87-U:** Matthew G. Wallace (Complainant) v. Gordan Allan (Union Representative for C.U.P.E. 958) (Respondent) (*Withdrawn*)
- 0892-87-U:** Somerville Belkin Industries Limited (Complainant) v. Energy & Chemical Workers Union, Local 30, Beverly Harris et al. (Respondents) (*Withdrawn*)
- 0893-87-U:** Josslyn E. Burgos (Complainant) v. Future Building Materials Limited (Respondent) (*Dismissed*)
- 0894-87-U:** Hotel Employees & Restaurant Employees Union, Local 604 (Complainant) v. Tren Inn Hotel (Peterborough) Limited (Respondent) (*Withdrawn*)
- 0899-87-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. Skelhorns Bus Lines Limited (Respondent) (*Withdrawn*)

**0918-87-U:** Doreen Francis Cook (Complainant) v. Poli-Twine, Ed Letinen, Canadian Auto Workers, and Jim Kennedy (Respondents) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO PROSECUTE**

**0676-87-U:** United Food & Commercial Workers Union, Local 175 (Applicant) v. Loblaw's, division of Westfair Foods (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0535-87-M:** Work Wear Corporation of Canada Ltd. (Employer) and Laundry & Linen Drivers & Industrial Workers Union Teamsters, Local 847 (Trade Union) (*Granted*)

## **JURISDICTIONAL DISPUTES**

**0207-87-JD:** Donalco Services Limited (Complainant) v. Labourers' International Union of North America, Local 527, and International Brotherhood of Painters & Allied Trades, Local 1891 (Respondents) (*Withdrawn*)

**0638-87-JD:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Complainant) v. Traugott Construction (Kitchener) Ltd., and Labourers' International Union of North America, Local 837 (Respondents) (*Withdrawn*)

**0804-87-JD:** Bytown Lumber Company Limited (Complainant) v. Teamsters' Local Union 230, Readymix Building, Supply, Hydro & Construction Drivers, Warehousemen & Helpers (Respondent) (*Withdrawn*)

## **COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT**

**0615-86-OH; 0616-86-OH; 0617-86-OH:** Ralph Marion, Jim Fawcett, and Roland Vautour (Complainants) v. Commonwealth Construction Company, division of Guy F. Atkinson Ltd. (Respondent) (*Dismissed*)

**0124-87-OH; 0125-87-OH:** David Jonathan Rabinovitch (Complainant) v. Paul Copeland (Respondent) (*Withdrawn*)

**0395-87-OH:** James Jefferson (Complainant) v. Pumps & Softeners (Respondent) (*Withdrawn*)

**0430-87-OH:** Jeffrey A. Domosalai (Complainant) v. Bell City Foundry Ltd. (Respondent) (*Dismissed*)

**0513-87-OH:** Eric Boyd (Complainant) v. University of Waterloo (Respondent) (*Withdrawn*)

**0665-87-OH:** The United Brotherhood of Carpenters & Joiners of America, Local 2041, on its own behalf & on behalf of Jim Homuth, Morris Delaney et al. (Complainants) v. P.J. Daly Construction Ltd., and Manuel Vargas (Respondents) (*Withdrawn*)

**0735-87-OH:** David Jonathan Rabinovitch (Complainant) v. The Crown in Right of Ontario, Ministry of Health, and Penetanguishene Mental Health Centre (Respondents) (*Withdrawn*)

**0888-87-OH:** Matthew G. Wallace (Complainant) v. Ian Noble, Robert Hennessy, The Hamilton Harbour Commission (Respondents) (*Withdrawn*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**0267-85-M:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Hardrock Forming Company (Respondent) (*Dismissed*)

**0268-85-M; 0269-85-M; 0270-85-M:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Hardrock Forming Company (Respondent) (*Dismissed*)

**0469-85-M:** The United Brotherhood of Carpenters & Joiners of America, Local 1190 (Applicant) v. Karl Thier Construction Limited, and Penka Carpentry Limited (Respondent) (*Dismissed*)

**0387-86-M:** International Union of Operating Engineers, Local 793 (Applicant) v. William Kutynec Excavating & Grading Limited, c.o.b. as Williams Contracting (Respondent) (*Granted*)

**2187-86-M:** Labourers' International Union of North America, Local 183 (Applicant) v. J.D.S. Investments Ltd., and Toronto Housing Labour Board (Respondents) (*Withdrawn*)

**2381-86-M:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, on its own behalf & on behalf of Local 463 (Applicant) v. Ontario Hydro, and The Electrical Power Systems Construction Association (Respondents) (*Granted*)

**2389-86-M:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Montreal Parquetry Floors Ltd./La Cie de Parquets de Montreal Ltee. (Respondent) (*Granted*)

**2801-86-M:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Keller & Associates Mechanical Contractors Inc. (Respondent) (*Withdrawn*)

**2852-86-M:** Brewery Workers Local 316 (Applicant) v. Northern Brewery Ltd., Northern Beverage Co. Thunder Bay, Ontario (Respondent) (*Withdrawn*)

**3045-86-M:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Coldmatic Refrigeration of Canada Ltd., and George Zafir Limited (Respondents) (*Granted*)

**3259-86-M:** United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. St. Thomas Acoustics & Drywall Inc. (Respondents) (*Granted*)

**3499-86-M:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Roch Cayer (Respondent) (*Withdrawn*)

**0227-87-G:** Sheet Metal Workers' International Association, Local 539 (Applicant) v. Tri-Star Limited (Respondent) (*Withdrawn*)

**0235-87-G:** Sheet Metal Workers' International Association, Local 539 (Applicant) v. Douglas Refrigeration Inc. (Respondent) (*Withdrawn*)

**0371-87-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. M. Dacunha Masonry Contractor (Respondent) (*Granted*)

**0389-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. P.J. Daly Contracting Ltd. (Respondent) (*Withdrawn*)

**0471-87-G; 0472-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Gerry Lowrey Ltd. (Respondent) (*Granted*)

**0582-87-G:** Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. Domingos Carpenters Contractors (593601 Ontario Ltd.) (Respondent) (*Granted*)

**0670-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (*Granted*)

**0674-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Matassa Contractors Limited (Respondent) (*Withdrawn*)

**0715-87-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ainsworth Electric Co. Ltd. (Respondent) (*Granted*)

**0741-87-G:** Labourers' International Union of North America, Local 493 (Applicant) v. Belanger Construction Limited, and R. M. Belanger Limited (Respondent) (*Dismissed*)

**0784-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Roma Excavating & Grading Limited (Respondent) (*Withdrawn*)

**0785-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. L.J.S. Construction Limited (Respondent) (*Withdrawn*)

**0786-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Pietro Cipriano Construction Ltd. (Respondent) (*Withdrawn*)

**0788-87-G:** Labourers' International Union of North America (Applicant) v. Andrew Paving & Engineering Limited (Respondent) (*Withdrawn*)

**0789-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Petermar Carpentry Ltd. (Respondent) (*Withdrawn*)

**0800-87-G:** Ontario Allied Construction Trades Council, and L.I.U.N.A., Local 1059 (Applicants) v. Namville Canada, and E.P.S.C.A. (Respondents) (*Withdrawn*)

**0805-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Concord Concrete & Drain Inc. (Respondent) (*Withdrawn*)

**0806-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Paving Limited (Respondent) (*Withdrawn*)

**0807-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Aberdeen Highlands Construction Limited (Respondent) (*Withdrawn*)

**0809-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Pineridge 1986 Ltd. (Respondent) (*Withdrawn*)

**0822-87-G:** Ontario Council of the International Brotherhood of Painters & Allied Trades & International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Bob Cinkant Painting Ltd. (Respondent) (*Granted*)

**0854-87-G:** Ontario Sheet Metal Workers Conference, and Sheet Metal Workers International Association, Local 537 (Applicants) v. E.S. Fox Limited (Respondent) (*Withdrawn*)

**0860-87-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Orlando Corporation (Respondent) (*Granted*)

**0865-87-G:** International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Starr Erectors Limited (Respondent) (*Withdrawn*)

**0869-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Hadovic Construction Ltd. (Respondent) (*Granted*)

**0898-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers Union, Local 736 (Applicant) v. E.S. Fox Limited, and Henry Miron (Respondents) (*Withdrawn*)

**0941-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Lego General Contracting (Respondent) (*Granted*)

**0963-87-G:** The Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 172, Restoration Steeplejacks (Applicant) v. The B. Phillips Co. Limited, and B. Phillips Co. (1987) Limited (Respondents) (*Withdrawn*)

**0967-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Carlesimo Steel Limited (Respondent) (*Granted*)

**0989-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Giffin Sheet Metals Limited (Respondent) (*Withdrawn*)

**1011-87-G:** Ontario Allied Construction Trades Council, and L.I.U.N.A., Local 597 (Applicant) v. Electrical Power Systems Construction Association, and Ontario Hydro (Respondents) (*Withdrawn*)

**1014-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Canadian Chair Services Ltd. (Respondent) (*Withdrawn*)

**1015-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Chairman Mills (Respondent) (*Withdrawn*)

**1050-87-G:** Labourers' International Union of North America, Local 607 (Applicant) v. LeBrun Northern Contracting Ltd. (Respondent) (*Withdrawn*)

**1051-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Retail Environments Ltd. (Respondent) (*Granted*)

**1052-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Applicant) v. Jaddco Anderson Limited (Respondent) (*Withdrawn*)

**1080-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Underground Services (1983) Ltd. (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**1296-82-U; 0195-83-U:** Luciano D'Alessandro, and Donato Marinaro (Complainants) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea (Respondents) (*Dismissed*)

**1104-83-U:** Gerald Lecuyer, Cash Podlewski, and John Polhill (Complainants) v. Canadian Paperworkers Union, Local 132, and Canadian Paperworkers Union (Respondents) v. Abitibi-Price Inc. (Intervener) (*Dismissed*)

**1625-85-R:** United Food & Commercial Workers International Union (Applicant) v. Almonte Nursing Home (Respondent) (*Dismissed*)

**2106-85-R; 2431-85-U:** Le Syndicat des Employes de Ser Vaas (CSN) (Applicant/Complainant) v. SerVaas Rubber Company Inc. (Respondent) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Intervener) (*Dismissed*)

**2644-85-M:** Grey Bruce Regional Health Centre (Applicant) v. Ontario Nurses' Association (Respondent) (*Dismissed*)

**0941-86-R:** Energy & Chemical Workers Union (Applicant) v. Canuck Compounders Inc. (Respondent) (*Granted*)

**2852-86-M:** Brewery Workers, Local 316 (Applicant) v. Northern Brewery Ltd., Northern Beverage Co. Thunder Bay, Ontario (Respondent) (*Withdrawn*)

**3193-86-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. J. M. Vinette Ltd. (Respondent) (*Withdrawn*)

**3400-86-R:** International Brotherhood of Painters & Allied Trades, Local 1795 & 1819 (Applicant) v. Walpat Glass & Aluminum Products Ltd., and M & I Aluminum Ltd. (Respondents) (*Dismissed*)

**0477-87-M:** Canadian Union of Public Employees, Local 129 (Applicant) v. The Corporation of the Town of Pickering (Respondent) (*Withdrawn*)

**0677-87-M:** Canadian Union of Public Employees, Local 2225 (Applicant) v. Newcastle Health Care Centre (Respondent) (*Withdrawn*)







*Ontario Labour Relations Board,  
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# ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1987



Ontario

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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1987] OLRB REP. SEPTEMBER**

**EDITOR: COLLEEN EDWARDS**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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## CASES REPORTED

1.	Ajax, The Town of; Re C.U.P.E., Local 54 .....	1117
2.	Balanyk, Elizabeth; Re ONA; Re Greater Niagara General Hospital, et al. ....	1121
3.	Brantford, The Corporation of the City of; Re Local Union No. 582, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO; Re C.U.P.E. ....	1125
4.	Catalyst Technology (Canada) Ltd.; Re B.B.F. Lodge 128; Re Boilermaker Contractors' Association .....	1131
5.	Domtar Inc., Domtar Forest Products, Woodlands Division; Re IWA; Re Lumber and Sawmill Workers Union, Local 2693 of the C.J.A.; Re C.P.U. ....	1132
6.	Great Lakes Forest Products Ltd. (Lakehead Woodlands Division); Re I.W.A. Canadian Regional Council No. 1; Re C.P.U.; Re Lumber and Sawmill Workers' Union .....	1136
7.	I.B.L. Industries Limited; Re C.A.W.; Re Group of Employees .....	1144
8.	Lakehead District Roman Catholic Separate School Board, The; Re O.C.O.T.A.; Re The Nipissing District Roman Catholic Separate School Board .....	1154
9.	Mollenhauer Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183; Re MTABA; Re Ellis-Don Limited; Re The Formwork Council of Ontario; Re Milne & Nicholls Ltd. ....	1156
10.	Peralta Foods - Ilda C., 538391 Ontario Limited c.o.b. as, and Vito Peralta; Re Great Lakes Fishermen and Allied Workers' Union .....	1162
11.	Sutherland and Schultz Limited; Re U.A., Local 463 .....	1174
12.	Toronto Housing Labour Bureau and Bramalea Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183; Re Presidential Group Limited and Presidential Group (Brookshire) Limited .....	1178
13.	United Canadian Malt Ltd.; Re U.F.C.W., Local 1230 .....	1188



## SUBJECT INDEX

- Certification - Practice and Procedure - Pre-Hearing Vote - Intervener requesting leave to withdraw its request for a pre-hearing vote and requesting that applicant's application be converted from a pre-hearing vote to a regular application - Requests denied - Intervener's application dismissed
- DOMTAR INC., DOMTAR FOREST PRODUCTS, WOODLANDS DIVISION; RE IWA; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U. .... 1132
- Certification - Practice and Procedure - Pre-Hearing Vote - Union requesting copy of the mailing list supplied by the employer to the Board for occasional teacher pre-hearing vote - Request allowed - Further requests to be honoured by the Registrar without reference to the Board
- LAKEHEAD DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD, THE; RE O.C.O.T.A.; RE THE NIPISSING DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD ..... 1154
- Certification - Whether s.13 prohibits the Board from certifying the applicant because the local's constitution has a citizenship requirement for membership in the union - Local had been notified earlier to amend its constitution to bring it into conformity with the parent's constitution which contained an anti-discrimination provision but amendment never made - Board finding the parent's constitution prevailing over inconsistent provisions in the local's constitution - S.13 not applicable
- BRANTFORD, THE CORPORATION OF THE CITY OF; RE LOCAL UNION NO. 582, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO; RE C.U.P.E. .... 1125
- Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - Fishing boat captain and crew laid off at height of fishing season during an organizing drive - Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act - Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate - Compensation awarded for one fishing season - President of corporate respondent personally liable
- PERALTA FOODS - ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.... 1162
- Construction Industry - Practice and Procedure - Unfair Labour Practice - Unfair labour practice complaint relating to carpentry framework within the residential sector - Complaint dismissed for delay and abuse of process
- TORONTO HOUSING LABOUR BUREAU AND BRAMALEA LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE PRESIDENTIAL GROUP LIMITED AND PRESIDENTIAL GROUP (BROOKSHIRE) LIMITED ..... 1178
- Construction Industry Grievance - Applicant union grieving that a member of another local was employed without having a referral slip - Employer seeking to rely on the provisions of the union's constitution governing members' use of travel cards - Union constitution cannot confer any rights on the employer nor can its mere existence give rise to an estoppel - Employer found to have violated collective agreement
- SUTHERLAND AND SCHULTZ LIMITED; RE U.A., LOCAL 463 ..... 1174

## II

Construction Industry Grievance - Reconsideration - Earlier decision to allow grievance revoked because intervener had not received notice of the hearing - Applicant's counsel undertaking to assist respondent's counsel to recover compensation paid pursuant to earlier decision	
CATALYST TECHNOLOGY (CANADA) LTD.; RE B.B.F., LODGE 128; RE BOILERMAKER CONTRACTORS' ASSOCIATION .....	1131
Employee Reference - Computer systems manager having considerable authority over employees with respect to computer systems although not their department head - Introduction of computer systems having impact on numbers of employees needed - Computer systems manager not an employee because he exercises managerial functions	
AJAX, THE TOWN OF; RE C.U.P.E., LOCAL 54 .....	1117
Evidence - Practice and Procedure - Respondent objecting to the scope of a summons on the basis that the documents required are irrelevant - Law on production of documents through a summons reviewed - Order to bring documents to next hearing	
MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE MTABA; RE ELLIS-DON LIMITED; RE THE FORMWORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD. ....	1156
Interference in Trade Unions - Change in Working Conditions - Intimidation and Coercion - Remedies - Unfair Labour Practice - Fishing boat captain and crew laid off at height of fishing season during an organizing drive - Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act - Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate - Compensation awarded for one fishing season - President of corporate respondent personally liable	
PERALTA FOODS - ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION....	1162
Intimidation and Coercion - Change in Working Conditions - Interference in Trade Unions - Remedies - Unfair Labour Practice - Fishing boat captain and crew laid off at height of fishing season during an organizing drive - Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act - Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate - Compensation awarded for one fishing season - President of corporate respondent personally liable	
PERALTA FOODS - ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA ; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION...	1162
Parties - Right of Access - Incumbent union allowed to intervene in raiding union's access application - Board reviewing access jurisprudence - Access section not intended to apply only to geographically remote work sites - Access ordered on terms	
GREAT LAKES FOREST PRODUCTS LTD. (LAKEHEAD WOODLANDS DIVISION); RE I.W.A. CANADIAN REGIONAL COUNCIL NO. 1; RE C.P.U.; RE LUMBER AND SAWMILL WORKERS' UNION .....	1136
Practice and Procedure - Certification - Pre-Hearing Vote - Intervener requesting leave to withdraw its request for a pre-hearing vote and requesting that applicant's application be converted from a pre-hearing vote to a regular application - Requests denied - Intervener's application dismissed	
DOMTAR INC., DOMTAR FOREST PRODUCTS, WOODLANDS DIVISION; RE IWA; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U. ....	1132

Practice and Procedure - Certification - Pre-Hearing Vote - Union requesting copy of the mailing list supplied by the employer to the Board for occasional teacher pre-hearing vote - Request allowed - Further requests to be honoured by the Registrar without reference to the Board	
LAKEHEAD DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD, THE; RE O.C.O.T.A.; RE THE NIPISSING DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD .....	1154
Practice and Procedure - Construction Industry - Unfair Labour Practice - Unfair labour practice complaint relating to carpentry framework within the residential sector - Complaint dismissed for delay and abuse of process	
TORONTO HOUSING LABOUR BUREAU AND BRAMALEA LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE PRESIDENTIAL GROUP LIM- ITED AND PRESIDENTIAL GROUP (BROOKSHIRE) LIMITED .....	1178
Practice and Procedure - Evidence - Respondent objecting to the scope of a summons on the basis that the documents required are irrelevant - Law on production of documents through a summons reviewed - Order to bring documents to next hearing	
MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE MTABA; RE ELLIS-DON LIMITED; RE THE FORMWORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD. ....	1156
Practice and Procedure - Sale of a Business - Parties informing Board that they had agreed there had been a sale of the business to the respondent - Board must be satisfied that it has jurisdiction under s.63 to make a declaration despite the agreement of the parties - Parties asked to set out the facts upon which their agreement was based - Board satisfied that sale had occurred	
UNITED CANADIAN MALT LTD.; RE U.F.C.W., LOCAL 1230 .....	1188
Practice and Procedure - Unfair Labour Practice - Complaint alleging respondents acted together to interfere with her right to be properly represented - Motion to dismiss complaint as disclosing no <i>prima facie</i> case - Review of jurisprudence on dismissal of complaint on such a ground - Respondents' motion dismissed	
BALANYK, ELIZABETH; RE ONA; RE GREATER NIAGARA GENERAL HOSPI- TAL, ET AL. ....	1121
Pre-Hearing Vote - Certification - Practice and Procedure - Intervener requesting leave to withdraw its request for a pre-hearing vote and requesting that applicant's application be converted from a pre-hearing vote to a regular application - Requests denied - Intervener's application dismissed	
DOMTAR INC., DOMTAR FOREST PRODUCTS, WOODLANDS DIVISION; RE IWA; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U. ....	1132
Pre-Hearing Vote - Certification - Practice and Procedure - Union requesting copy of the mailing list supplied by the employer to the Board for occasional teacher pre-hearing vote - Request allowed - Further requests to be honoured by the Registrar without reference to the Board	
LAKEHEAD DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD, THE; RE O.C.O.T.A.; RE THE NIPISSING DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD .....	1154
Reconsideration - Construction Industry Grievance - Earlier decision to allow grievance revoked	

#### IV

because intervener had not received notice of the hearing - Applicant's counsel undertaking to assist respondent's counsel to recover compensation paid pursuant to earlier decision

CATALYST TECHNOLOGY (CANADA) LTD.; RE B.B.F., LODGE 128; RE BOILERMAKER CONTRACTORS' ASSOCIATION ..... 1131

Remedies - Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Fishing boat captain and crew laid off at height of fishing season during an organizing drive - Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act - Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate - Compensation awarded for one fishing season - President of corporate respondent personally liable

PERALTA FOODS - ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.... 1162

Right of Access - Parties - Incumbent union allowed to intervene in raiding union's access application - Board reviewing access jurisprudence - Access section not intended to apply only to geographically remote work sites - Access ordered on terms

GREAT LAKES FOREST PRODUCTS LTD. (LAKEHEAD WOODLANDS DIVISION); RE I.W.A. CANADIAN REGIONAL COUNCIL NO. 1; RE C.P.U.; RE LUMBER AND SAWMILL WORKERS' UNION ..... 1136

Sale of a Business - Practice and Procedure - Parties informing Board that they had agreed there had been a sale of the business to the respondent - Board must be satisfied that it has jurisdiction under s.63 to make a declaration despite the agreement of the parties - Parties asked to set out the facts upon which their agreement was based - Board satisfied that sale had occurred

UNITED CANADIAN MALT LTD.; RE U.F.C.W., LOCAL 1230 ..... 1188

Unfair Labour Practice - Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Remedies - Fishing boat captain and crew laid off at height of fishing season during an organizing drive - Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act - Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate - Compensation awarded for one fishing season - President of corporate respondent personally liable

PERALTA FOODS - ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.... 1162

Unfair Labour Practice - Construction Industry - Practice and Procedure - Unfair labour practice complaint relating to carpentry framework within the residential sector - Complaint dismissed for delay and abuse of process

TORONTO HOUSING LABOUR BUREAU AND BRAMALEA LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE PRESIDENTIAL GROUP LIMITED AND PRESIDENTIAL GROUP (BROOKSHIRE) LIMITED ..... 1178

Unfair Labour Practice - Practice and Procedure - Complaint alleging respondents acted together to interfere with her right to be properly represented - Motion to dismiss complaint as disclosing no *prima facie* case - Review of jurisprudence on dismissal of complaint on such a ground - Respondents' motion dismissed

BALANYK, ELIZABETH; RE ONA; RE GREATER NIAGARA GENERAL HOSPITAL, ET AL ..... 1121

Union Successor Status - Union meeting to vote on merger with another union - Irregularities

with respect to notice of meeting and right to vote on merger - Law concerning trade union mergers will relieve against mere technical deficiencies where there has been substantial compliance with the spirit of constitutional provisions - Board making union successor status declaration

I.B.L. INDUSTRIES LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES ..... 1144



**2533-86-M Canadian Union of Public Employees Local 54, Applicant v. The Town of Ajax, Respondent**

**Employee Reference - Computer systems manager having considerable authority over employees with respect to computer systems although not their department head - Introduction of computer systems having impact on numbers of employees needed - Computer systems manager not an employee because he exercises managerial functions**

**BEFORE:** S.A. Tacon, Vice-Chair, and Board Members D. A. MacDonald and B. L. Armstrong.

**DECISION OF THE BOARD;** September 10, 1987

1. By letter dated February 17, 1987, a Board Officer was appointed pursuant to an application under section 106(2) of the *Labour Relations Act* in which the applicant is seeking a determination as to whether Adam Mazer is an employee within the meaning of the Act.
2. The Board Officer conducted the usual examination. Representing the applicant were: Jim Woodward, M. Cibbo, Sean Dillon, Gina Stewart; for the respondent, R. J. Hawkshaw, R. Parisotto, G. Kirkbride and D. J. Low.
3. The applicant asserted that Mazer, classified as Systems Manager, should not be excluded from the bargaining unit by virtue of section 1(3)(b) of the Act. The respondent takes the position that Mazer should be excluded pursuant to section 1(3)(b) and, in this regard, filed submissions dated April 22, 1987, with the Board within the time prescribed for making such representations. The applicant did not make any written submissions.
4. It is useful at this juncture to refer to a rather lengthy passage from *St. Joseph's Hospital* (unreported) Board File No. 1867-84-M, dated June 4, 1986:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] 1 CLRBR at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve counter-vailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants

to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

3. *The Labour Relations Act* does not contain a definition of the term "managerial function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the results in every situation, and in assessing each case, the Board must have due regard to the nature of industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's

authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced persons will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the management line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall* case above referred to, titles alone are not much assistance in determining what a person's functions really are...

The cases cited above would seem to indicate that while a person may have minor supervisory functions or very limited confidential functions in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b)).

6. It should always be remembered, however, that *The Labour Relations Act* is intended to extend collective bargaining rights to employees, and it is incumbent upon any party seeking to exclude employees from the scheme of the Act, to come forward with affirmative evidence that they exercise managerial functions. (See: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283 at paragraph 11; and *Bakery and Confectionery Workers International Union v. Salmi*, 56 DLR (2d) 193.) Furthermore, (and in addition to the usual rule that "he who asserts must prove"), a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position.

• • •

7. We can summarize these general approaches then, as follows:

- (1) A party seeking to exclude an individual from the ambit of a remedial statute designed to extend benefits to employees, must be prepared to demonstrate that the disputed individual is not an employee.

• • •

- (4) Modern forms of corporate organization, improved means of communication, and the development of sophisticated institutionalized personnel policies, have all significantly diminished the role (and perhaps need for) the "traditional foreman", so that he is no longer the king-pin he once was. This process has several effects - all of which are evident if one surveys the dozens of reported and unreported cases recently decided under section 1(3)(b). First, co-ordinating or supervisory functions which in the past were often associated with "real" managerial authority, may not be sufficient standing alone, to exclude one from collective bargaining. Second, it is much easier, in practice, to maintain an existing managerial exclusion, than to justify the creation of a new level of management. Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.
- (5) The acceptance of the "effective recommendation test" mentioned above, means that it is not necessary to show that the disputed individual performs his role independently of higher levels of management. But it is necessary to show that his recommendations are *really* effective, so that, in practice, and to a substantial degree, he becomes the effective decision maker in respect of matters impacting upon his fellow employees. From an evidentiary standpoint, it will be useful and often necessary to provide *concrete examples* of this kind of decision, and it will also frequently be necessary to hear from the person who actually made the decisions in order to show that the recommendations of the disputed individual were indeed decisive. In too many cases, in recent years, this evidence has either not been available at all, or when examined closely, amounts to no more than a "participatory decision-making style". Whatever value the latter may have in improving

employee performance or ensuring adherence to corporate goals, it does not necessarily mean that managerial authority has percolated downwards.

5. With this background, the Board turns to the instant case. In the circumstances, the Board sees no need for a detailed review of the testimony and the documents filed in evidence. In the Board's view, Mazer should be excluded from the bargaining unit by virtue of section 1(3)(b) of the Act. Mazer's responsibilities with respect to the computer systems make him part of the management team. While he does not have formal control over employees in the bargaining unit on a daily basis in the sense that he is their department head, it is clear that he possesses considerable authority over those persons with respect to the computer systems. For example, with regard to those computer systems and their introduction, he trains employees, assigns work, monitors their performance and establishes the criteria for job evaluation. On one occasion during his brief period in the position, his recommendation as to hiring a specific individual was followed. Further, the introduction of the various computer systems has an impact on the numbers of employees needed to perform specific duties. Mazer's authority was increased during his months in the position to ensure he had the "clout" to implement and develop the various computer systems. Mazer also effectively hires temporary employees as needed with respect to the computer systems and terminates those persons if they are not performing at the required level. As well, he is intimately involved with the respondent's budgetary process throughout its stages of development, including costings of collective bargaining proposals, and regularly attends management meetings. Mazer's access to the computer and all of the information contained in the systems therein is more complete than that of any of the respondent's other staff.

6. In short, the Board is satisfied that the conflicts which section 1(3)(b) is intended to avoid would be present if Mazer was not excluded from the bargaining unit. Accordingly, the Board finds that Mazer, classified as Systems Manager, is not an "employee" within the meaning of the Act. Given the Board's finding, the Board need not deal further with the other matters raised in the respondent's letter of April 22, 1987.

**2544-86-U; 3504-86-U Elizabeth Balanyk, Complainant v. Ontario Nurses' Association, Respondent v. Greater Niagara General Hospital, Intervener; Elizabeth Balanyk, Complainant, The Greater Niagara General Hospital, Ontario Nurses' Association, Patricia Stuart, Marianne Orcutt, Al Weier and Liz Woods, Respondent**

**Practice and Procedure - Unfair Labour Practice - Complainant alleging respondents acted together to interfere with her right to be properly represented - Motion to dismiss complaint as disclosing no *prima facie* case - Review of jurisprudence on dismissal of complaint on such a ground - Respondents' motion dismissed**

**BEFORE:** *Harry Freedman*, Vice-Chair and Board Members *L. C. Collins* and *J. F. Davidson*.

**APPEARANCES:** *William S. Challis*, *Lynn Harper* and *Elizabeth Balanyk* for the complainant; *Donald F. O. Hersey, Q.C.*, *Jill Welch*, *Felicity D. Briggs* and *Liz Woods* for the Ontario Nurses' Association, *Liz Woods* and *Marianne Orcutt*; *Louisa Davie*, *Al Weier*, *Mary Grady* and *Pat Stuart* for the Greater Niagara General Hospital, *Pat Stuart* and *Al Weier*.

**DECISION OF THE BOARD;** September 11, 1987

1. These are two complaints filed pursuant to section 89 of the *Labour Relations Act*. The complaint in Board File No. 2544-86-U alleges that the respondent trade union violated section 68 of the *Labour Relations Act*. Certain individuals were originally named as respondents in that complaint, but by decision dated April 21, 1987, the Board, differently constituted, noted the withdrawal of that complaint against those individuals. The complaint in Board File No. 3504-86-U alleges that the named respondents violated sections 64, 66 and 70 of the Act. These two complaints were listed for hearing together before this panel of the Board.

2. When the hearing convened, the Board entertained brief submissions from counsel for the complainant with respect to whether the Board should rule, as a preliminary matter, on whether it was a court of competent jurisdiction within the meaning of section 24 of the *Canadian Charter of Rights and Freedoms*. The Board did not deal with that motion as a preliminary matter.

3. The Board then received argument on a motion made in respect of the complaint in Board File No. 3504-86-U by the counsel for all of the respondents in that complaint. They moved for the dismissal of the complaint before a hearing into the merits pursuant to Rule 71 of the Board's Rules of Procedure on the grounds that the complaint did not disclose a *prima facie* case for the remedy requested. Following the submissions of all counsel, the Board made the following oral ruling:

Counsel for the respondents in this complaint have moved to dismiss this complaint on the grounds that it does not disclose a violation of the Act and does not make out a case for the relief requested. The complaint alleges that the various respondents violated sections 64, 66 and 70 of the *Labour Relations Act* by conduct which intimidated the complainant in the exercise of her right to seek proper representation.

The complainant is a registered nurse employed by the respondent hospital and is in a bargaining unit represented by the respondent trade union. She has filed a complaint against the trade union claiming a violation of section 68 of the Act about its conduct. The allegations made in this complaint include all of the allegations that she makes in that complaint under section 68 of the Act.

We entertained this motion, which has taken up over two days of hearing, without initially considering the merit of proceeding in this way. The motion is made pursuant to section 71 of the Board's Rules of Procedure which provides in part:

"Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal."

Section 71 gives the Board the discretion to dismiss this motion without determining whether the parties making the motion have persuaded the Board that they have established the necessary grounds for allowing the motion.

In *International Association of Bridge, Structural and Ornamental*

*Ironworkers*, [1982] OLRB Rep. Feb. 233 the Board, in addressing itself to the exercise of discretion under section 71 wrote at paragraph 4:

“Section 71(1) of the Rules provides:

‘Where an application or complainant does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.’

Although counsel for the respondents contended that the Board has a duty to dismiss a complaint which does not make out a *prima facie* case, section 71(1) clearly provides the Board with a discretion. In some circumstances it is eminently appropriate for the Board to exercise its discretion under that provision to dismiss a complaint where it is apparent that no useful purpose would be served in listing the complaint for hearing since the facts as alleged could not support an argument that a violation of the Act had occurred (see, for example, *Heist Industrial Services*, 63 CLLC ¶16,263; *Patternmakers Association of Hamilton and Vicinity*, [1970] OLRB Rep. Sept. 688; *Ernest D’Andrea*, [1975] OLRB Rep. Aug. 646; *Local 1285 United Automobile Aerospace & Agricultural Workers Union of America*, [1975] OLRB Rep. Apr. 387; *Masonry Contractors’ Association (Toronto-Incorporated)*, [1970] OLRB Rep. Dec. 1124; and *Woodall Construction Company Limited*, [1979] OLRB Rep. June 597). However, where as in the present proceedings, the complaint raises subtle questions of fact that are largely dependent upon the inferences that may properly be drawn from circumstances and events that occurred over a relatively lengthy period of time, combined with important and relatively complex issues of labour relations law and policy, the Board is of the view that it is not appropriate to dismiss the matter pursuant to section 71(1) without a full hearing on the merits. Accordingly, the respondent’s motion to dismiss this complaint without a hearing pursuant to section 71(1) of the Rules is hereby dismissed.”

The Board has also stated that a motion to dismiss a complaint because no *prima facie* case has been made out should only be allowed where there is no reasonable likelihood that the complainant can succeed. The Board in *J. Paiva Foods Limited*, [1985] OLRB Rep. May 690 wrote at page 691:

“The Board’s discretion to dismiss a complaint on the grounds that it does not disclose a *prima facie* case should only be exercised in the clearest of cases, that is, when the Board is satisfied that there is no reasonable likelihood that a violation of the Act can be established on the facts as alleged. This approach has been set out in the *International Association of Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Feb. 233 at page 234....

See also *Caravelle Foods*, [1983] OLRB Rep. June 875 at page 881 where the Board stated:

The words ‘*prima facie*’ in section 71 are meant to allow the dismissal of a case without a hearing where the allegations are insufficient to render *reasonable or arguable a conclusion that the Act has been breached*.

[emphasis added]

See also *Shaw v. McLeod*, (1982), 35 O.R. (2d) 641.”

In this case, the complainant’s theory is that the respondents acted together to interfere with the exercise of her right under the *Labour Relations Act* to be properly represented in dealing with the respondent hospital in relation to certain allegations made about her conduct. Without repeating the precise allegations of impropriety that were made, counsel for the complainant, in

essence, submits that the complainant can bring a complaint against the respondents under sections 64, 66 and 70 in relation to the conduct which she alleges interfered with the exercise of her right to be represented.

We have, during the course of argument on the motion, dismissed the complaint in relation to section 64 of the Act on the grounds that the complainant has no status to bring a complaint alleging a violation of that section. Section 64 protects the rights of a trade union, not individuals or members represented by that trade union. See *T.I.A. Limousine Operators Association*, [1979] OLRB Rep. Aug. 810; *Dufferin Aggregates*, [1983] OLRB Rep. July 1031.

The argument made by the complainant is a novel one and while we have some doubt at this stage that the theory of the complainant's case, on the allegations as pleaded, give rise to a violation of the Act, we are not prepared to say, as we must if we are to allow the motion, that "... the allegations are insufficient to render reasonable or arguable a conclusion that the Act has been breached." See *Caravelle Foods*, [1983] OLRB Rep. June 875 at 881.

The complaint against the respondent trade union under section 68 of the Act will be proceeding in any event. Much of the evidence that will be relevant in the instant complaint will also be relevant to the complaint against the trade union under section 68. In a case such as this, it does not appear to us that the hearing will be abbreviated to any significant degree by ruling on the respondents' motion at this stage. Additionally, we are of the view that the circumstances in this case are similar to the situation faced by the Board in the *International Association of Bridge, Structural Ornamental Ironworkers*, *supra*, that is, the complaint raises questions of fact that depend upon inferences that can be drawn from the evidence together with difficult questions of law and policy relating to the extent to which an individual can seek to obtain a remedy from parties that are alleged to be interfering with a trade union's duty of fair representation owed to that individual under the Act.

Therefore, we hereby dismiss the respondents' motion. In doing so, we are not, and we emphasize the word not, determining that the complaint does make out a *prima facie* case. Rather, we are deciding that in the circumstances of this case, it is inappropriate to rule on that issue as a preliminary matter.

4. Following the Board's oral ruling, the parties agreed that these two complaints be consolidated. Therefore, having regard to the agreement of the parties, the Board directed that these two complaints be consolidated.

5. Counsel for the complainant sought to have the Board determine that the respondent hospital proceed first in adducing evidence. After receiving the submissions from counsel for the complainant, and having regard to the position of the counsel for all of the respondents, who opposed counsel for the complainant on that procedural issue, the Board ruled that the complainant would proceed first to adduce evidence, followed by the respondent trade union and the individual respondents represented by the trade union and then followed by the respondent employer and the individual respondents represented by the employer.

6. This matter is referred to the Registrar to be listed for hearing before this panel of the Board on November 26, 30, December 10, 14, 21, 22, 23, 1987; January 18, 19, 20, 21, 27, 28, February 1, 2, 3, and 4, 1988.

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**3075-86-R** Local Union No. 582, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Applicant v. **The Corporation of the City of Brantford**, Respondent v. The Canadian Union of Public Employees, Intervener

**Certification - Whether section 13 prohibits the Board from certifying the applicant because the local's constitution has a citizenship requirement for membership in the union - Local had been notified earlier to amend its constitution to bring it into conformity with the parent's constitution which contained an anti-discrimination provision but amendment never made - Board finding that parent's constitution prevailing over inconsistent provisions in the local's constitution - Section 13 not applicable**

**BEFORE:** Owen V. Gray, Vice-Chair, and Board Members R. M. Sloan and R. R. Montague.

**APPEARANCES:** T.W.G. Pratt, J.C.G. Thomson and J.C. Fuller for the applicant; C.C. White for the respondent; no one for the intervener.

**DECISION OF THE BOARD;** September 10, 1987

1. This is an application for certification. In our decision herein dated April 6, 1987, we found that the applicant ("Local 582") is a trade union as defined by clause 1(1)(p) of the *Labour Relations Act* ("the Act"). The issue addressed in this decision is whether section 13 of the Act prohibits the Board from certifying Local 582, having regard to the following provision in its local constitution:

*Any person applying for membership in this Local must be of good moral character and reputation, and unless waived by the International for proper cause upon application by the local, must have been a resident for at least eighteen months immediately preceding his application within its jurisdiction and be a citizen of the United States or Canada.*

[emphasis added]

2. We raised this issue of our own motion following the hearing which was concerned with whether the applicant is a trade union, in our decision of April 6, 1987:

5. Neither the Board nor any of the parties focused attention on the *citizenship* requirement in the applicant's constitution, a requirement which did not appear in the constitution of the applicant in *Shaw Festival Theatre Foundation Canada, supra*. No reference was made during our hearing to the Board's decision in *Victor Productions Limited and Co.*, [1971] OLRB Rep. Oct. 685, in which the Board concluded that the Act prohibited certification of another local of the IATSE because a similar citizenship requirement appeared in the parent union's constitution. The relevant section of the Act was then section 10, which read, in part:

The Board shall not certify a trade union ... if it discriminates against any person because of his race, creed, colour, nationality, ancestry or place of origin.

Following its earlier decision in *The Journal of Publishing Company of Ottawa, Limited*, [1970] OLRB Rep. Dec. 925, the Board concluded that a citizenship requirement constituted discrimination on the basis of race, nationality, ancestry or place of origin.

6. The section on which the Board acted in *Victor Productions Limited and Co.*, *supra*, remained in the present Act as section 13 until December 18, 1986 when, by section 23(1) of the *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c.64, it was amended by striking out "his race, creed, colour, nationality, ancestry, age, sex or place of origin" in the fifth and sixth lines and inserting in lieu thereof "any ground of discrimination prohibited by the *Human Rights Code*, 1981 or the *Canadian Charter of Rights and Freedoms*." Sections 1 and 8 of the *Human Rights Code*, 1981, S.O. 1981, c.53 provides:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap.

8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

7. In the circumstances, we would be remiss if, before embarking on the elaborate inquiry into the list and the scope of the applicant's craft which will be necessary if the applicant trade union is not disqualified from certification, we did not consider whether this applicant is a trade union which cannot be certified because it discriminates on the basis of citizenship.

8. Accordingly, we direct that this matter be relisted for hearing before this panel in order to consider whether the applicant is a trade union to which section 13 of the Act applies because it discriminates on the basis of citizenship.

3. In *Victor Productions Limited and Co.*, [1971] OLRB Rep. Oct. 685, the Board found that Local 58 of the International Alliance Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE") or ("the Alliance") could not be certified because the then constitution of IATSE, Local 58's parent union, restricted membership to "citizens of the United States, or Canada, or any territory in which the Alliance exercises jurisdiction, and when application is made in Canada, to any British subject". James Fuller was then President of Local 58. He still is. At the hearing directed in our decision of April 6, 1987, he testified that at Local 58's request, IATSE responded to the decision in *Victor Productions Limited and Co.*, *supra*, by amending the membership provisions its constitution to eliminate the citizenship requirement and prohibit discrimination on certain grounds, so that the relevant portions with respect to membership thereafter provided:

#### Article 1

#### Section 3. Membership

The membership of this Alliance shall comprise the members in good standing of such local unions as shall hold a charter from this Alliance, and said affiliated local unions and such per-

sons who, having been members of any local union which has had its charter revoked or suspended, shall retain their membership in this Alliance in the manner provided in these laws, and such persons as may acquire and hold direct membership in this Alliance pursuant to these laws. Eligibility for membership in this Alliance shall be restricted to residents of the United States or Canada, or any territory in which the Alliance exercises jurisdiction.

*There shall be no discrimination against any person in respect to membership in this Alliance by reason of race, color, creed, national origin, sex or age.*

[emphasis added]

These amended provisions came into effect on August 16, 1974. IATSE Locals were advised to amend their existing local constitutions to conform with these new provisions. Local 58 did. Local 582 did nothing. Its current local constitution is still the one which came into effect on April 30, 1974, prior to the critical amendment to the parent constitution; it had not been amended between that date and the date this application was filed.

4. The Board's decision in *The Journal Publishing Company of Ottawa Limited*, [1970] OLRB Rep. Dec. 925 suggests that, by virtue of what is now subsection 103(4) of the Act, positive evidence of admission into membership of non-citizens in disregard of the citizenship requirements in its constitution might relieve a trade union of the disability which would otherwise result from there being such a requirement in its constitution. If that is correct, which we need not decide, the evidence before us in this case falls short of the standard set by that decision. The only evidence on this point is that of Jim Thompson, Local 582's business manager. He has been a member of the local since 1950. He is not aware of the local's ever having rejected an application for membership because of the applicant's citizenship. Equally, he is not aware of there being any current member who is not a citizen of the United States or Canada nor of any successful applicant for membership who has not been a citizen of one of those two countries.

5. In this case, the critical issue is the effect to be given to the membership and anti-discrimination provisions of the constitution of the "parent" union - IATSE. The respondent argues that no effect should be given to those provisions because under the *Labour Relations Act* a local union is treated as having an identity separate and distinct from that of a "parent" union with which it is affiliated. While that is true, the enquiry here is not whether Local 582 would be treated as distinct from IATSE so that, for example, a 6 months' bar on further certification applications by Local 582 would not be a bar to an application with respect to the same employees by IATSE or another of its local unions. The enquiry here is whether the rules which govern the internal affairs of Local 582 with respect to eligibility for membership include a citizenship requirement. The respondent says that the citizenship requirement set out in the local constitution is one of the rules which govern the applicant. The applicant says it is not.

6. We have already reproduced the portions of Article 1, Section 3 of the current IATSE constitution, which provides that members of local unions *and the local unions themselves* are all *members* of the Alliance. Article 2, section 1 of that constitution provides:

Supreme Law

This Constitution and By-Laws shall be the supreme law of this Alliance and of its constituent members.

The status of local unions within the Alliance is addressed in a number of provisions, including the following:

## Article 2 (Government):

### Section 4. Local Unions

Each affiliated local union, subject to the laws of this Alliance, shall exercise full and complete control over its own membership and affairs. This provision shall not be construed to confer upon local unions the power to enact laws inconsistent with any portion of this Constitution and By-Laws.

## Article 18 (Charters):

### Section 1. Power to Grant Charters

The power to grant charters of affiliation to subordinate local unions shall be vested in the Convention and in the President of this Alliance when a Convention is not in session.

### Section 8. Acceptance of Constitution and By-Laws

Any local union accepting and holding a charter from this Alliance, and becoming an affiliate in membership, does so only upon condition that it recognizes the supreme jurisdiction of the International Alliance and accepts the Constitution and By-Laws of the Alliance as its fundamental law, reserving to itself no rights of self-government inconsistent with the Constitution and By-Laws of the Alliance.

### Section 11. Revocation of Charters

d. The charter of any affiliated local union may be suspended or revoked for violations of the laws of this Alliance, as contained in this Constitution and By-Laws in the manner provided hereafter in Article Twenty.

## Article 19 (Powers and Duties of Local Unions):

### Section 2. Home Rule

Home Rule is granted to all affiliated local unions of this Alliance and this shall be construed to confer upon each local union the authority to exercise full and complete control over its own affairs; provided, however, that no local union shall take any actions or adopt any laws which conflict with any portion of this Constitution and By-Laws.

### Section 3. Constitution and By-Laws

The affiliated local unions of this Alliance may adopt individual Constitutions and By-Laws for their own government, but such laws or any proposed amendments thereto must be submitted to the International President for his approval before adoption. No constitutional provision or by-law shall be adopted by any affiliated local union without such approval by the International President.

Any local union failing to comply with the provisions of this Section shall be punishable by a fine, or suspension, or revocation of its charter.

In the event that any affiliated local union shall adopt any law without the approval herein above provided for or inconsistent with the provisions of this Constitution and By-Laws, such local law shall be void and of no effect and the members of the local union shall not be bound thereby.

Article 19, section 24 provides that when the charter of an affiliated local union is revoked, all of the property of the local becomes the property of the Alliance. Article 7, section 16 gives the International President the power to revoke the charter of a local union pursuant to Article 18, section 11 or to declare that a state of emergency exists in a local and take over control of the property and affairs of the local. There can be no doubt that under the IATSE constitution, affiliated local

unions are subordinate to and can have no meaningful existence independent of the Alliance and the provisions of the IATSE constitution.

7. In addition to the provision in issue, the local constitution of Local 582 contains these provisions:

Article 1, Section 2:

This Local has been established and exists by virtue of a Charter issued by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereafter called the Alliance or International) and pursuant to the Constitution and By-Laws of the International.

Article 5, Section 1:

The International Constitution and By-Laws, as well as this Constitution and By-Laws, shall be the supreme law of this Local.

The respondent argues that the International Constitution and Bylaws referred to in these provisions can only be the International Constitution and Bylaws in existence in April 1974 at the time Local 582's current constitution was adopted. Thus, it is said, the provisions of the current IATSE constitution cannot be treated as incorporated by reference into the Local's constitution. Even if that is so (which we are inclined to doubt), it does not lead to the conclusion that the Local 582 is not governed by the current IATSE constitution in the conduct of its affairs. Even if given the limited meaning contended for by the respondent, these provisions make it clear (if it would not otherwise have been clear) that, as of April 30, 1974 at least, Local 582 was bound by the provisions of the IATSE constitution then in effect. A consolidation of those provisions is in evidence before us, as are consolidations made at various other subsequent times as amendments were made. As a member of IATSE bound by the terms of that constitution, Local 582 became bound by properly effected amendments to that constitution as they were made thereafter and, so, must now be bound by the constitutional provisions by which other members of IATSE are currently bound. Thus, Local 582 is bound by the provisions of the current IATSE constitution whether or not that is the meaning of Article 5, section 1 of its local constitution.

8. While the current IATSE constitution expressly prohibits a local union's adopting an inconsistent local constitution, it does not expressly address the status of a once consistent local constitution which has become inconsistent as a result of amendments to the IATSE constitution. Article 19, section 2, however, expressly prohibits a local union's *acting* in a manner inconsistent with the IATSE constitution. Having regard to the relationship between IATSE and its locals, the practical result is that when a provision of the local constitution is in conflict with a provision of the IATSE constitution the latter will prevail whatever the local constitution may say, since so long as the local is affiliated with IATSE it is bound as a member by the IATSE constitution and liable to severe sanctions if it violates the provisions of that constitution.

9. Membership in a local is membership in the Alliance; thus, discrimination in respect of membership in a local is discrimination in respect of membership in the Alliance. Discrimination with respect to membership in Local 582 by reason of race, colour, creed, national origin, sex or age would be a violation by Local 582 of the IATSE constitution, whether or not the constitution of Local 582 mandates such discrimination. Having regard to the analysis in *Victor Productions Limited and Co.*, *supra*, which was the impetus for IATSE's adopting its prohibition on discrimination with respect to membership, it must be clear that the IATSE constitution *prohibits* Local 582 from discriminating with respect to membership by reason of citizenship.

10. In summary, while the applicant's local constitution requires discrimination on grounds of citizenship, the IATSE constitution prohibits such discrimination. The applicant is bound by the IATSE constitution; its provisions prevail over inconsistent provisions of the applicant's local constitution. Accordingly, it cannot today be said of Local 582, as it could once have been said both of it and of Local 58, that the rules by which its affairs are governed require it to discriminate on grounds referred to in section 13 of the Act. Local 58 was found "certifiable" in *Harbourfront Corporation*, [1982] OLRB Rep. Nov. 1624, when it demonstrated that it was no longer governed by the rules found offensive in *Victor Productions Limited and Co.*, *supra*. We find that Local 582 is not governed by a requirement restricting membership to citizens of any particular country and that, accordingly, it has not been shown to be a trade union to which section 13 of the Act applies.

11. The parties are prepared to agree that the appropriate bargaining unit for the purpose of this application consists of:

All stage employees of the respondent at the Capitol Theatre at 88 Dalhousie St. in the City of Brantford, save and except technical Director and Manager and those persons above the rank of Technical Director and Manager.

It transpires, however, that the parties have a profound disagreement about which of the respondent's employees at the Capitol Theatre on the date of the application were "stage employees". It is apparent that this disagreement is more a disagreement about the meaning of "stage employee" than a disagreement about what the persons in question were hired to do or did do on the application date. The respondent takes the position that the persons it employed as "stage employees" on the date of the application were the 29 people sent to it by the applicant in response to a request for 4 "carloaders" and 25 "stage hands". The union says that of the 25 "stage hands" who set up and later dismantled the production at the theatre, only 16 remained to actually "operate" the show. It says that only those 16 are "stage employees".

12. We would be disinclined to adopt the distinction advocated by the union in defining the appropriate bargaining unit unless compelled to do so by subsection 6(3) of the Act. That subsection provides:

(3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

It will be necessary for this applicant to satisfy all the requirements of this subsection in order to have the benefit of it: see *Harbourfront Corporation*, [1982] OLRB Rep. Nov. 1624; *Centrestage Toronto*, [1985] OLRB Rep. Nov. 1560; and, *The Stratford Shakespearean Festival Foundation of Canada*, [1986] OLRB Rep. Nov. 1577. To have its view of the matter prevail, the applicant will have to demonstrate, among other things, that stage hands who operate productions have skills which distinguish them from carloaders and from stage hands who assemble and disassemble productions and that stage hands who operate productions "commonly bargain separate and apart from" and are not "commonly associated in their work and bargaining" with either carloaders or stage hands who assemble and disassemble productions.

13. While the parties had at one point jointly requested that the Board appoint a labour relations officer "to inquire into the duties and responsibilities of the thirteen individuals challenged by the applicant to determine if they are members of this craft unit", this only begs the real question - namely, what sorts of stage hands or other employees fall within the craft unit (if any) which will be appropriate under subsection 6(3) of the Act on a certification application by the applicant? Until that question is answered, any inquiry into the duties and responsibilities of the particular persons employed by the respondent on the application date would be premature.

14. Accordingly, we direct that this matter be relisted to hear the evidence and argument of the parties with respect to the composition of the appropriate bargaining unit and all other matters remaining in issue.

**0341-87-G** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, Applicant v. **Catalyst Technology (Canada) Ltd.**, Respondent v. Boilermaker Contractors' Association, Intervener

**Construction Industry Grievance - Reconsideration - Earlier decision to allow grievance revoked because intervener had not received notice of the hearing - Applicant's counsel undertaking to assist respondent's counsel to recover compensation paid pursuant to earlier decision**

**BEFORE:** Robert D. Howe, Vice-Chair, and Board Members G. O. Shamanski and D. A. Patterson.

**APPEARANCES:** A. J. Ahee, J. Malloney and S. Petronski for the applicant; R. C. Filion, R. V. Eikner and J. R. Moses for the respondent; R. C. Filion, J. W. Schel and M. Sanderson for the intervener.

#### **DECISION OF THE BOARD;** September 28, 1987

1. The style of cause of this application is amended to add "Boilermaker Contractors' Association" as an intervener.

2. In a decision (reported in [1987] OLRB Rep. June 803) dated June 5, 1987, regarding this referral of a grievance to the Board for final and binding determination under section 124 of the *Labour Relations Act*, this panel of the Board wrote, in part, as follows (in paragraph 15):

For the foregoing reasons, the Board, pursuant to section 124 of the *Labour Relations Act*, hereby makes the following determination:

- (1) the respondent is, and was at all material times, bound by the collective agreement dated November 1, 1986 between the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and the Boilermaker Contractors' Association;
- (2) the respondent violated Article 4:01 of that collective agreement by employing persons who were not members of the Union, and who were not hired through the Union offices, to perform the work of discharging and loading of catalyst on the Suncor Project in Sarnia during the period from April 24 to May 8, 1987; and

- (3) the respondent shall forthwith pay to the applicant in trust (for distribution to its members who, as a result of the respondent's violation of Article 4:01 of the collective agreement, were wrongfully denied an opportunity to perform the aforementioned work for the respondent, and to the pertinent funds, including the Union's National Health and Welfare Fund, National Pension Fund, Educational Training Fund, and Apprenticeship Fund) the sum of \$124,176.96.

3. The matter was subsequently listed for hearing before this panel of the Board on September 28, 1987, for the purpose of hearing the evidence and representations of the parties with respect to a request by the intervener and the respondent that the Board reconsider that decision. At that hearing, we reconsidered and revoked our June 5, 1987 decision, pursuant to section 106(1) of the Act, on the ground that the intervener had not received notice of the May 20, 1987 hearing which gave rise to that decision. That reconsideration and revocation is hereby confirmed.

4. At the September 28, 1987 reconsideration hearing, counsel for the applicant undertook to assist counsel for the respondent in whatever way he could to have released to the respondent the monies of which it has been deprived as a result of steps that have been taken to enforce the June 5, 1987 decision.

5. The matter is referred to the Registrar to be listed for hearing *de novo* before another panel of the Board on dates to be fixed by the Registrar in consultation with the parties.

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**1252-87-R; 1457-87-R** International Woodworkers of America, Applicant v. Domtar Inc., Domtar Forest Products, Woodlands Division, Respondent v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Intervener #1 v. Canadian Paperworkers Union, Intervener #2

**Certification - Practice and Procedure - Pre-Hearing Vote - Intervener requesting leave to withdraw its request for a pre-hearing vote and requesting that applicant's application be converted from a pre-hearing vote to a regular application - Requests denied - Intervener's application dismissed**

**BEFORE:** *Judith McCormack*, Vice-Chair, and Board Members *J. F. Davidson* and *C. A. Ballentine*.

**DECISION OF THE BOARD;** September 4, 1987

1. This is an application for certification by the International Woodworkers of America ("IWA") in which the Canadian Paperworkers Union ("CPU") has filed a subsequent application for certification by way of intervention. Both the IWA and the CPU have requested that pre-hearing representation votes be taken of employees in the respondent's Woodlands Division, Red Rock.

2. The Board addressed its practice in these circumstances in *Bio Shell Inc.* [1983] OLRB Rep. Mar. 318 as follows:

7. Section 103(3) provides the Board with substantial discretion in dealing with an application for certification that is filed with the Board on behalf of employees in a bargaining unit subsequent to the filing of another application for certification relating to any of the same employees but prior to the Board issuing a final decision on the first application. Section 103(3) provides as follows:

(3) Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

8. When a subsequent application is filed with the Board on or before the terminal date set for a previously filed application for certification, the Board, as in this case, regularly exercises the discretion set out in section 103(3)(a) and treats the subsequent application as having been made on the date of the making of the original application.

Where the Board exercises its discretion in this manner, and pre-hearing representation votes have been requested in both applications, membership support will be assessed under section 9(2) and (4) as of the date of the original application (*Koehring Canada*, [1986] OLRB Rep. Nov. 1530).

3. In this case, however, counsel for the CPU urges us to use the actual date of its subsequent application to assess the level of membership support under section 9(2). If the date of the original application is used, it appears that the CPU will not have membership support of at least 35% of employees in the voting constituency, a requirement under section 9(2) for a pre-hearing representation vote. In support of this position, counsel for the CPU alleges that the IWA and the incumbent Lumber and Sawmill Workers Union ("LSWU") intend to merge shortly. As a result, counsel argues that the dismissal of the CPU's application because it does not appear to have the requisite membership support will render the subsequent two-way vote meaningless. Regardless of which of the IWA or the LSWU wins the vote, the employees involved will eventually be represented by the same union. In this "friendly raid" situation, the CPU argues that employees are not being given a meaningful choice in selecting a bargaining agent.

4. Alternatively, CPU asks leave of the Board to withdraw its request for a pre-hearing vote with the result that its application will be treated as a regular application. Counsel then requests that the Board decline to order a vote in the IWA's application, thereby converting it to a regular application as well. The result would be that the IWA and the CPU would be required to have membership support of 45% before the Board would direct a vote, but that support would be assessed as of the terminal date rather than the application date. Counsel for the CPU cites *Bio Shell*, *supra*, in support of this request.

5. We are not persuaded by either of the CPU's arguments. The Board recently dealt with a similar situation in the *Board of Education for the City of North York*, [1987] OLRB Rep. Jan. 116, where an application for certification requesting a pre-hearing vote was filed, followed by an

application for certification by way of intervention in which a pre-hearing vote was also requested. The Board directed that the subsequent application be treated as having been made on the application date of the original application and found that there was the appearance of membership support for each applicant of not less than 35% of employees in the voting constituency. A vote was therefore directed pursuant to section 9(2). After the vote was held, the Board made its assessment under section 9(4) and found that in fact the subsequent applicant did not have membership support of at least 35% of employees in the bargaining unit on the deemed date of application. The subsequent applicant then came before the Board to request that the Board use the actual date of its application as the time for assessing membership support under section 9(4), rather than the deemed date flowing from section 103(3)(a). In rejecting this argument, the Board made the following observations which are pertinent to this case:

In our view, a reading of section 103(3) confirms its remedial thrust. It gives a tardy applicant something that it would not otherwise have: a right to participate, *as an applicant*, in another union's certification proceeding rather than having to wait until the earlier application has been disposed of. But the right of a latecomer to participate may carry with it certain disabilities - namely that its application will be treated as having been made on the date of the making of the original application. That is what happened here, and it is evident that the first Board panel used June 13, 1984, as the date for assessing the unions' appearances support, and directed a vote on that basis. We do not think that it would be consistent with the earlier Board decision or the interpretation of section 9(4) if the phrase "the time the application was made" were now given a different meaning. If this creates something of an anomaly or leads to a result based upon a fiction, it is only because of the way in which section 103 recognizes but also limits the rights of latecomers who file "intervener" applications for certification.

[emphasis original]

6. Moreover, while we acknowledge the concerns of the CPU with respect to the anticipated merger between the IWA and the LSU, there is no allegation that the merger has actually occurred. It is also far from clear from the submissions made what procedures will be adopted in this regard, when the merger is expected to occur, and what form the merger will take. Until events take place establishing that the IWA and the LSU are no longer separate entities, it is premature to make a determination based on this assumption. In this regard, we adopt the Board's views in *Abitibi Price Inc.*, unreported, Board File 1060-87-R, August 10, 1987.

7. We note as well that section 103(3) provides the Board with three options in this situation: we can treat the subsequent application as having been made on the date of the original application, we can postpone consideration of the subsequent application or we can refuse to entertain it. Here, the CPU asks us to consider its application and the original application simultaneously, but not treat the former as having been made on the date of the original application. We are not convinced that this course of action is authorized by section 103(3). However, if we have the jurisdiction to grant the CPU's request, we are not prepared to do so for the reasons and in the circumstances described above.

8. Turning to the CPU's second argument, while we might be prepared to consider allowing the CPU to withdraw its request for a pre-hearing representation vote, we do not read *Bio Shell, supra*, as authority to handle the IWA's application in the manner suggested. In that case, the Board dealt with an application for certification in which a pre-hearing vote was not requested, and a subsequent application where a pre-hearing vote was requested. To address the hybrid situation which resulted, the Board denied the request for the pre-hearing vote on the second application so that both applications could be processed together as regular applications.

9. In the first place, we would be reluctant to apply the *Bio Shell* approach which was developed to address a hybrid situation in circumstances like those before us where no such hybrid

situation exists. What counsel for the CPU suggests is that his client would be prepared to manufacture a hybrid situation. However, if we permitted the CPU to withdraw its request for a pre-hearing vote, these circumstances would resemble more closely those addressed by the Board in *Koehring Canada, supra*, where the original applicant for certification had requested a pre-hearing vote and a subsequent applicant did not. While the Board did not have to decide the matter because the subsequent applicant in that case ultimately asked to amend its application to request a pre-hearing vote, the Board indicated it would have been more inclined to postpone consideration of the second application under section 103(3) than to deny the original applicant's request for a pre-hearing vote to eliminate the hybrid problem. The Board's inclination in that case makes considerable sense to us in this matter as well. The fact is that the CPU is the tardy applicant in this case which has brought itself before the Board by intervening in the IWA's proceedings. In these circumstances we are reluctant to allow the CPU to transform those proceedings in the manner suggested, particularly since the more onerous threshold of membership support on a regular application might cause the defeat of the original applicant in some cases.

10. We therefore determine pursuant to section 103(3) that the CPU's application will be treated as having been made on the date of the making of the IWA's application. It appears to us on an examination of the records of the IWA and the records of the respondent that not less than 35% of the employees of the respondent in the voting constituency hereinafter described were members of the IWA at the time the application was made. It also appears to us on an examination of the records of the CPU and the records of the respondent that less than 35% of the employees of the respondent in the voting constituency hereinafter described were members of the CPU at the time the application is deemed to have been made. As a result, the CPU's application is dismissed.

11. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

all employees of the respondent at its Domtar Forest Products, Woodlands Division at Red Rock who are engaged in woods operations on the limits and on the worksites of the respondent.

For the purpose of clarity, the Board notes the parties' agreement that the employees in the voting constituency are the same persons as those in the bargaining unit currently described in the collective agreement between the LSWU and the respondent.

12. All employees of the respondent in the voting constituency on August 20, 1987 who have not voluntarily terminated their employment or who have not been discharged for cause between August 20, 1987 and the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether they wish to be represented by the International Woodworkers of America or by the Lumber and Sawmill Workers Union in their employment relations with the respondent.

13. This matter is referred to the Registrar.

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**3408-86-M; 3242-86-M I.W.A. Canadian Regional Council No. 1, Applicant v. Great Lakes Forest Products Ltd. (Lakehead Woodlands Division), Respondent v. Canadian Paperworkers' Union, Intervener; Canadian Paperworkers Union, Applicant v. Great Lakes Forest Products Limited, Respondent v. Lumber and Sawmill Workers' Union, Intervener**

**Parties - Right of Access - Incumbent union allowed to intervene in raiding union's access application - Board reviewing access jurisprudence - Access section not intended to apply only to geographically remote work sites - Access ordered on terms**

**BEFORE:** *Judith McCormack*, Vice-Chair, and Board Members *F. C. Burnet* and *C. A. Ballentine*.

**APPEARANCES:** *Bernard Hanson, William J. Pointon* and *John Smithies* for I.W.A. Canadian Regional Council No. 1; *Brian Switzman, Cecil Makowski, Michael Hunter* and *Larry Quesnel* for Canadian Paperworkers' Union; *F. J. W. Bickford* and *D. H. Burn* for the respondent; *H. M. Pol-lit* for Lumber and Sawmill Workers' Union.

**DECISION OF THE BOARD;** September 14, 1987

1. These matters are two applications under section 11 of the *Labour Relations Act* for directions allowing the applicants access to the respondent's property for the purpose of attempting to persuade employees to join a trade union. On May 14, 1987, the Board gave the following oral decision:

After carefully considering the evidence and representations of the parties, we find that the applicants have met the criteria in section 11, and we direct that representatives of each applicant be allowed access to camps #517, #603, #134, #418, #234, #328, #45 and #602 on the following terms:

- (a) Before attempting to enter the camp, the union desiring access shall notify Mr. Douglas Burn or his designate not later than the close of business on the last business day prior to the date on which access is desired.
- (b) There shall be no solicitation of an employee during the employee's working hours.
- (c) While in the camp, the representatives of CPU and IWA will obey all camp rules and regulations including those relating to the use of safety equipment.
- (d) Representatives of the two (2) unions shall not be in camp at the same time. CPU and IWA will have the right to access on alternate working days.
- (e) At the time of entering a camp, the union representative(s) must notify the unit superintendent or his designated representative if he or she is reasonably available.

Access on the above terms will commence forthwith. Our reasons will follow.

We now provide our reasons.

2. The respondent in both cases is in the forest products business and operates eight bush camps to this end in northern Ontario. Applications for access directions to several other kinds of work sites were withdrawn by the applicants. Some 600 to 700 employees work out of these camps on a Monday to Friday, two shift rotation basis performing various functions primarily relating to the harvesting of forest products. They live in modular bunkhouses in the camps during the week and most return home on weekends. In addition to the bunkhouses, the camps include a recreation hall, a cafeteria, a steam bath, drying rooms for clothing, an administrative office, and a repair garage.
3. The camps are scattered throughout an area in northern Ontario bounded by Sioux Lookout on the north, Dryden on the west, Thunder Bay on the south, and Lake Nipigon on the east. The employees who work there form part of a larger bargaining unit of approximately 1,100 woodlands employees who are currently, and have been since 1946, represented by the Lumber and Sawmill Workers' Union (the "LSWU"). Of those 1,100 employees, the vast majority are drawn from some 43 Ontario communities with a few out-of-province employees.
4. Mail is delivered to the camps by a delivery system set up by the respondent which also operates its own telephone system connecting to the provincial telephone structure. Each camp has two telephone lines and at least one telephone in a public area for the use of employees. Some of the camps are serviced by provincial highways while others are accessible by roads maintained by the respondent. At least one television is provided for employees in each camp, although the quality of reception may vary, depending on the origination and strength of the available television signals. Personal radios are permitted and several copies of one of the Thunder Bay newspapers are delivered daily. Employees generally leave and return to the camps by car. Most employees remain in the camps from Monday to Friday, although some may return to their homes or visit other communities in mid-week.
5. Both applicants are in the process of conducting organizing campaigns in which they seek to displace the LSWU as the bargaining agent of the respondent's woodlands employees. The organizing efforts directed towards these employees are part of a more massive campaign on the part of each applicant to wrest the bargaining rights from the LSWU for 4,000 to 5,000 woodlands employees employed by a number of different forest products companies in northern Ontario. Each of the applicants has been pursuing other means of organizing employees in addition to making these applications, including calling meetings in local community centres, leafletting, telephoning and so forth, with varying degrees of success. Both initially sent organizers into the camps who were asked to leave the property by officials of the respondent. There is no dispute that the camps are located on property owned by the respondent or to which the respondent has the right to control access.
6. Before turning to the merits of these applications, we propose to address a preliminary matter with respect to the LSWU's standing before us. At the outset of these hearings, the LSWU applied to intervene in the application by the Canadian Paperworkers Union (the "CPU") over the objections of the applicant. The application by the I.W.A. Canadian Regional Council No. 1 (the "IWA") was not before us at that time as it was consolidated with the CPU application at a later point in the hearings. The Board ruled orally that the LSWU would be permitted to intervene in the case before us.
7. Subsequently, a number of other applications by the CPU and the IWA with respect to Domtar Inc. and Abitibi-Price Inc. came before another panel of the Board. When the LSWU applied to intervene in those applications, its request was denied. (See: *Domtar Inc.*, [1987] OLRB

Rep April 485 and *Abitibi-Price Inc.*, unreported, Board File 3348-86-M, April 8, 1987.) When the hearings before us resumed, the application by the IWA had been adjourned over to these proceedings. The CPU then applied for reconsideration of this panel's ruling with respect to the intervenor's status to appear on the basis of inconsistency with the *Domtar* and *Abitibi-Price* decisions, and the LSWU applied to intervene in the IWA application. The Board declined to reconsider its decision and allowed the LSWU to intervene in the IWA application. We now provide our reasons.

8. We do not find our decision on standing to be inconsistent with that of the panel hearing the *Domtar* and *Abitibi Price* cases. The fact that the decisions reach different results reflects distinctions in the issues and situations they address. Section 102(13) of the *Labour Relations Act* provides as follows:

(13) The Board shall determine its own practice and procedure which shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

Section 79 of the Board's Rules of Procedure, provides:

79. The Board may direct that any person be added as a party to a proceeding or be served with any document, as the Board considers advisable.

The Board has found previously that while certain persons or entities may have a right to standing, the Board retains a discretion to grant standing which extends beyond those circumstances in which a right can be asserted (*Ontario Hydro*, [1986] OLRB Rep. May 663).

9. In the *Domtar* case the Board addressed the question of whether the LSWU had a legal right to intervene in the proceedings. The Board concluded as follows:

For the foregoing reasons, the Board is of the view that the incumbent union has no right to intervene in these proceedings because, in our view, none of its legal rights are or can be detrimentally affected by the order sought by the applicant.

10. In our case our decision dealt with whether we should exercise our discretion to allow the LSWU to intervene, whether or not they were entitled to intervene as of right. We were of the view that the CPU was in essence asking for the assistance of the Board to facilitate an organizing campaign which, if successful, would result in the displacement of the LSWU as the legal bargaining agent of employees. Moreover, this application was made in the context of a massive organizing drive in which the LSWU was in danger of being displaced as the bargaining agent for four to five thousand woodlands employees. Access for a "raiding" union in these circumstances was an unusually sensitive situation, and in addition, a number of legal issues were raised with respect to section 11 which had not been previously addressed in the Board's jurisprudence. We therefore considered whether it would be useful to have the LSWU participate in the hearings whether or not it was entitled to standing as of right.

11. A significant factor in our consideration in this regard was the increased potential for delay that another participant in the proceedings might create. In matters like this where expedition is critical, the Board must decide whether the benefit anticipated from the party who seeks standing on a discretionary basis is outweighed by the increased delay and expense likely to result from their participation (see *Ontario Hydro, supra*). In making that assessment in our case, we noted that counsel for LSWU had advised us that he would not be calling evidence. Thus it did not appear that the proceedings would become unduly protracted as a result of LSWU's involvement.

(In contrast, in *Domtar, supra*, the employer did not contest the application and the only opposition came from the LSWU.) On balance and in these somewhat unusual circumstances, the Board was of the view that it made good labour relations sense *in our case* to allow the LSWU to participate in the proceedings.

12. Turning to the merits of these applications, counsel for the applicants argued, among other things, that there were only two conditions set out in section 11: that is, that employees *reside*, and that they reside on the *property of the employer* or *on property to which the employer controls access*. Those conditions having been met in this case, they argued the Board has no discretion to refuse an order for access. They advised the Board that they were unable to find a reported Board case in which access had been denied and no such case was produced by either the LSWU or the respondent.

13. The respondent and the LSWU argued, among other things, that section 11 was intended to apply to those situations in which the work sites involved were remote or isolated. In their view, an access direction should not be issued unless this was the case and the applicants could demonstrate that there were no other reasonable means of access to employees, or in the alternative, that the applicants had exhausted such other reasonable means. In addition, they took the position that the Board must be particularly alert to the difficulties involved where access is requested to employees already represented by a bargaining agent, and that the test for access in these circumstances should be more stringent.

14. Section 11 of the *Labour Relations Act* provides as follows:

Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

The importance of access in the scheme of collective bargaining contemplated by the Act was described by the Board in *Domtar, supra* in the following terms:

The purpose of the Act is to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions *as the freely designated representatives of employees*. Under section 3 of the Act, every person is free to join a trade union of his own choice and to participate in its lawful activities. However, collective bargaining cannot become a practical reality unless employees are exposed to the debate about the pros and cons of trade unions, or a particular union.

[emphasis original]

Similarly, the Canada Labour Relations Board pointed out in *Dome Petroleum Limited* [1977] CLRB R 392:

Employees have rights under the Code, but history has shown that those rights are usually only translated into a meaningful exercise of them when employees are informed of them, the method of exercising them and the benefits to be derived from their exercise. Representations of established trade unions are the common vehicle for purveying this information.

In this sense access to employees is a critical precondition to the exercise of those rights which are fundamental to the Act's premise. This is particularly so where the Act contemplates a membership card system which necessarily involves some degree of face-to-face contact as the primary means of initiating a collective bargaining regime (see *Domtar, supra*, and *Grand & Toy Limited* [1986] OLRB Rep Sept. 1223).

15. The only assistance we were able to obtain from the Board's cases with respect to the arguments before us is contained in *Consolidated Canadian Faraday Limited and Dumbarton Mines Limited*, [1974] OLRB Rep. Jan. 30 in which the Board said:

Having considered the representation of the respondents, we are of the view that section 10 of the Act [now section 11] is applicable to employees of an employer who reside on the property of the employer in Ontario, or on property in Ontario to which the employer has the right to control access, *without further condition or restriction*.

[emphasis added]

Although it is suggested that this passage supports the applicants' position, we find it a little too succinct to be helpful.

16. A review of other legislation and jurisprudence provides a little more insight. We were directed to section 199 of the *Canada Labour Code* which reads as follows:

199.(1) Where the Board

- (a) receives from a trade union an application for an order granting an authorized representative of the trade union access to employees living in an isolated location on premises owned or controlled by their employer or by any other person, and
- (b) determines that access to the employees
  - (i) would be impracticable unless permitted on premises owned or controlled by their employer or by such other persons, and
  - (ii) is reasonably required for purposes to soliciting union membership, the negotiation or administration of a collective agreement, the processing of a grievance or the provision to employees of a union service, the Board may make an order granting the authorized representative of the trade union designated in the order access to the employees on the premises of their employer or such other person, as the case may be, that are designated in the order.

\* \* \*

(2) The Board shall, in every order made under subsection (1), specify the method of access to the employees, the times at which access is permitted and the periods of its duration.

We note that two of the criteria urged upon us by the respondent and the LSWU are set out explicitly in section 199. The contrast with section 11 where different criteria are specified is suggestive.

17. The parallel British Columbia provision is closer to our legislation. Sections 4 (1) and (2) provide as follows:

(1) Except with the employer's consent, a trade union or person acting on its behalf shall not attempt, at the employer's place of employment during working hours, to persuade an employee of the employer to join or not join a trade union.

(2) Where employees reside on their employer's property to which he or another person has the right to control access or entry the employer or other person shall on the board's direction permit a representative authorized in writing by a trade union to enter the property to attempt to persuade the employees to join a trade union. If directed by the board and on request by the representative, the employer shall provide him with food and lodging at the current price, and of a similar kind and quality as that provided to the employees.

18. Both the applicants and the respondent cited *H.S. Rai Farms Ltd. et al.*, 82 CLLC ¶16,169 which was decided under this provision in support of their respective positions. In that case, the B.C. Labour Relations Board addressed a number of applications for access with respect to seasonal farmworkers who resided on the employers' property for a portion of the year. The union argued, as the applicants argue here, that the only criteria which had to be met were those set out in the provision. The employers urged the Board to incorporate the criteria set out in section 191 of the *Canada Labour Code* in interpreting the British Columbia provision. The British Columbia Labour Relations Board declined to accept this latter argument both in *Rai Farms*, *supra*, and in the subsequent case of *Ledcore Construction Limited*, 85 CLLC ¶16,055. It noted the differences in criteria set out on the face of the *Canada Labour Code* and the B.C. provision, and was not prepared to impose the conditions in the former onto the latter. The Board also found the applicant's arguments unpersuasive for reasons to which we will return later.

19. We have a number of concerns about the interpretative approach urged upon us by the LSWU and the respondent. On its face, section 11 provides for a simple and definitive right of access for residential employees. As well, it must be read in the context of a legal and labour relations environment where access is crucial to the scheme of collective bargaining, and where expedition is essential if the section is to have any real value. In practical terms, timing plays a vital role in the progress of an organizing campaign and organizers seek to achieve and maintain a certain momentum over the course of the weeks leading up to a certification application. The role of timing is highlighted legally as well by the Board's treatment of "stale" membership evidence (for example, see *Charterways Transportation Ltd.* [1979] OLRB Rep. Nov. 1068). And where employees are already represented, timing becomes even more central because the period in which a displacement application is allowed is limited by statute. As a result, an interpretative approach to section 11 which produces protracted litigation is likely to render the provision meaningless.

20. It appears to us that a construction of section 11 in which we must examine whether there are other reasonable means of access and/or whether such means have been exhausted is likely to have that effect. In addition, we are not sanguine that particularly sound conclusions can be drawn in this regard. For example, on the basis of the evidence before us, the respondent and LSWU argued that the applicants' lack of success to date was based on incompetence on the part of organizers or a lack of interest in the applicant on the part of employees who were well aware of their rights under the Act. The applicants took the position on the identical evidence that it demonstrated the difficult conditions and obstacles in their path which necessitated access orders. In fact, we found the evidence inconclusive with respect to either of these particular arguments. It is simply difficult to judge whether or why a campaign may be unsuccessful, particularly when it is in its preliminary stages, and there is no way of knowing how it may progress.

21. However, were we to accept the position argued by the respondent and intervener, it would be difficult to avoid hearing this kind of evidence and engaging in what amounts to an evaluation of the efficacy and competence of the union's efforts to date. This seems to us an area fraught with difficulties and unlikely to be particularly useful. There are a wide variety of different kinds of organizing situations which unions with significant variations in organizing styles and resources address. In the face of this diversity, we are not prepared to set up a particular standard for an organizing campaign which an applicant must first meet before it is entitled to an access order. In addition, the respondent's arguments suggest that an applicant might only be successful with an application made fairly late in the campaign, when such an evaluation would have any hope of being meaningful. This seems at odds with the purpose of an access order. In the end, it appears to us that the interpretation urged upon us by the respondent and the LSWU is likely to produce a great deal of time consuming and unhelpful evidence and create such delay that the purpose of the section may well be defeated.

22. We do not find the argument that section 11 was intended to apply only to geographically remote work sites compelling. There are other types of isolation beyond geographic, and if section 11 is directed at isolation, on its face it is directed at precisely the degree of isolation from communication with union organizers which usually results when employees reside on property owned or controlled by the employer. Looking, then, at the syntax of section 11, its purpose and the labour relations environment in which it must be applied, it appears to us that the submission that the only criteria which must be met are those set out in the section itself has considerable merit.

23. In the alternative, the respondent and the LSWU advanced a test developed in the *Rai Farms* case to the effect that the appropriate criterion is whether resident employees have the same opportunity for exposure to the union as non-resident employees. The B.C. Board made the following comments in this regard:

The sensible approach to Section 4(2) is this. Unions use a variety of legitimate methods to inform employees of the advantage of union membership. Face-to-face contact with employees can be achieved in a variety of ways: direct communication at the work place outside working hours (for example, at lunch breaks) by fellow employees; leafletting and discussion at the entrance to the work site before and after work; and, approaching the employee at home after work; and, approaching the employee at home after work. But the methods are limited where employees reside on the employer's premises and access to the property is controlled by the employer. Leafletting at the entrance to such a work site, a common and accepted organizing tactic, is simply not an alternative. The employee never really leaves the site (except in rather isolated instances to attend to personal business or the like). It is less common for the union to visit employees at home - it is time-consuming and can meet employee resistance - but it is not unusual for a meeting to be held at the home of an employee who is a union sympathizer. The other employees can be invited to it. Again, if the employees reside on the employer's property this is not available in the same way - the union organizer does not have the opportunity to attend the meeting.

There are clearly important differences, then, between employees residing on the employer's premises and other employees. These differences do not achieve any statutory purpose. There is no reason apparent from the statute why employees who reside on their employer's property should, for that reason alone, have less access to information concerning collective bargaining. The choice of collective representation should be open to such persons in the same way it is available to the great majority of the work force who live away from their work site and travel to and from their job daily.

Section 4(2) is an attempt to recognize this imbalance by neutralizing to some extent the factor of separation. The Code recognizes that employees working on their employer's property should have access to information from trade union organizers in the same way as other employees have such access.

24. While we find these comments illuminating with respect to the purpose of access orders, we are not convinced that they support the proposition that another test should be added to those criteria already set out in section 11 in Ontario. The B. C. Board approached the matter as one of striking a balance between section 4(1) and section 4(2), and appears to suggest that the latter represents the general thrust, if not a complete code, of access rights available in B.C. A different approach has evolved in Ontario where the Board has been prepared to facilitate access even in those cases beyond the ambit of section 11. In *Adams Mine, Cliffs of Canada Limited* [1982] OLRB Rep. Dec. 1767 and *T. Eaton Company Limited* [1985] OLRB Rep. June 941 the Board considered the question of access in the more general case of non-resident employees in the course of unfair labour practice complaints alleging interference with organizing activities. Thus, we do not read section 71, the corollary to section 4(1), as a restriction on section 11 in the same manner as the B.C. Board reads section 4(1) as limiting 4(2). Rather, the interests represented by section 71 are to be balanced with those set out in section 3 and the other provisions analyzed by the

Board in the *Adams Mine* and *T. Eaton Company* cases, while section 11 addresses the more specific case of resident employees. As a result, the test posited in *Rai Farms*, that is, whether resident employees have less of an opportunity to be exposed to the union than non-resident employees has to some extent already been addressed by section 11. The Legislature has determined that they do, and as a result has made specific provision for them.

25. The argument that the criteria for access orders should be more stringent where employees are already represented implies that freedom to choose a particular union is assigned less value under the *Labour Relations Act* than the right to join a union at all. We do not find this proposition supportable. Rather, we adopt the comments made by the Board in *Domtar, supra*:

9. There is nothing on the face of section 11 which suggests that it should not apply for “raids”, in which one union is seeking to displace another. Quite the contrary. The Legislature has expressly contemplated the possibility of displacing an incumbent union, and has merely limited the time for doing so to the “open period” in the collective agreement. (See sections 5 and 61 of the Act.) Apart from that, it is left to the employees to determine whether they wish to be represented or by whom. There is no reason to limit the meaning of the term “trade union” in section 11 or to give it other than its ordinary meaning: any organization which meets the requirement of section 1(1)(p) of the Act. The right to access is just as important in a raid situation as in the case of an unorganized group of employees - indeed, perhaps even more important because the incumbent will already have an established presence and access must be available so that a rival can orchestrate its organizing campaign to capitalize on the limited window of opportunity presented by the “open period”. If another union seeks to present itself as a plausible alternative, it will require contact with the employees in order to make its case. Anything which delays or impedes access to the employees for the purpose of signing membership cards may limit their right to be represented by the union of their choice; and section 11 makes it abundantly clear that such contact should not be limited solely because the employer controls access to the premises on which the employees reside.

As a result, we are not prepared to formulate a different test under section 11 where employees are already represented.

26. We conclude that the only criteria that the applicants must meet are those set out in the Act, that is, that employees must reside on property owned by or to which access is controlled by the employer, an interpretation we find consistent with both the wording and the purpose of this provision. We do not, however, accept the argument that access orders are automatically and inevitably forthcoming once those criteria are met. While it may be that the significance of access to collective bargaining suggests a general predisposition towards granting an order where those conditions are satisfied, the section is not mandatory and the Board retains a discretion to deal with the unusual case where access may be inappropriate.

27. The respondent and the LSWU also argued that employees living in the camps from Monday to Friday did not “reside” there within the meaning of section 11. We find this unpersuasive. In our increasingly mobile society, what constitutes residence may vary considerably. It is not necessary for us to define the outer limits of “reside” as it is used in section 11, because we are satisfied that living on the employer’s property five days a week is within those limits. As noted earlier, it was not disputed that the camps are owned by the respondent or that the respondent controls access to them.

28. The respondent also argued that access should not be granted because the inter-union rivalry between the two applicants and the incumbent might lead to disruption and even violence. We find it inappropriate to conclude from the fact that three unions are involved that disruption will necessarily occur. We note that the applicants volunteered to subject themselves to the terms of access set out above which prohibit access during an employee’s working hours and provide

access on alternate days to each applicant. These are terms which appear to address the respondent's concerns in an eminently sensible fashion. The Board therefore found that the applicants were entitled to relief under section 11 and directed access as described above.

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**0205-87-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Applicant v. I.B.L. Industries Limited, Respondent v. Group of Employees, Objectors**

**Union Successor Status - Union meeting to vote on merger with another union - Irregularities with respect to notice of meeting and right to vote on merger - Law concerning trade union mergers will relieve against mere technical deficiencies where there has been substantial compliance with the spirit of constitutional provisions - Board making union successor status declaration**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *J. A. Ronson* and *B. L. Armstrong*.

**APPEARANCES:** *B. Chercover*, *H. Mitic*, *Jane Armstrong* and *A. Willson* for the applicant; *M. Failes*, *Robert Kranstz* and *Hugh Windsor* for the respondent; *J. Ivan Marini* and *Klaas Veldman* for the objectors.

**DECISION OF THE BOARD; September 17, 1987**

1. This is an application under section 62 of the *Labour Relations Act* for a declaration that the applicant (also referred to in this decision as the "CAW", for ease of reference) has acquired the rights, privileges, and duties of the I.B.L. Employees Union (the "Union") by reason of a merger, amalgamation, or transfer of jurisdiction.

2. Prior to February of 1986, employees of the respondent (also referred to in this decision as the "Company") bargained with their employer through an employees' association known as the I.B.L. Employees' Association (the "Association"). In or about February of 1986, that organization adopted a new constitution (the "Constitution") and changed its name to the I.B.L. Employees Union. New by-laws (the "By-laws") were also adopted at that time.

3. The Constitution includes the following provisions:

2. MEMBERSHIP

Membership will be open to every employee of the I.B.L. Industries Limited who is an employee within the meaning of the Ontario Labour Relations Act.

3. INITIATION

3.01 An employee shall be admitted to membership upon completing an application form for membership and shall be issued a membership card in a form to be determined by the Executive Committee. Every person who desires to become a member shall pay an initiation fee in an amount to be set from time to time by resolution by the Executive Committee.

• • • •

3.05 Each applicant for membership in the Union shall fill in on his application for membership

his home address and he shall thereafter in writing advise the secretary of the Union of any change in his home address. Any written notice or other written communication given or sent to any member of the Union shall be deemed to be sufficiently given or sent if addressed to him at the home address on file with the Union or at the address of the I.B.L. Employees Union where he is working.

• • • •

#### 8. AMENDMENT OF CONSTITUTION

8.01 This Constitution may be amended by a vote of two-thirds of the members present at a meeting of members, duly constituted and convened by a Notice given to all members at least ten days prior to the meeting at which the amendment is presented.

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#### 10. MEETINGS

10.01 The annual or any other general meeting of the members shall be held at such place in Ontario as the Committee may determine and on such day as the Committee shall appoint. At every annual meeting, in addition to any other business that may be transacted, the report of the Committee and the financial statements shall be presented. The Committee or the President or Vice-President shall have power to call at any time a special general meeting of the members of the Union. Then [sic] so called, no public notice or advertisement of members' meetings, annual or special, shall be required, but notice of the time and place of every such meeting shall be mailed or delivered to each member at least seven days before the time fixed for the holding of such meeting.

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#### 11. DUES

11.01 The Committee shall have the power from time to time to fix the initiation fee, such initiation fee shall be at least \$1.00.

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4. Counsel also referred the Board to Article 16 of the By-laws. That article provides, in part, as follows:

#### Article 16

##### RULES OF ORDER

(1) The President, or, in his absence the Vice-President, shall take the chair at the time specified at all Regular and Special Meetings. In the absence of both the President and the Vice-President, a Chairman pro-tem shall be chosen by the Union Committee.

(2) A motion to be entertained by the Chairman must be seconded and the Mover as well as the Seconder be recognized by the Chair.

• • • •

(6) When a Member desires to speak on a question, or offers a motion, he shall rise in his place and respectfully address the Chairman, but shall not proceed further until recognized by the Chair, except to state that he rises to a point of order or on question of privilege.

• • • •

(22) All business done in the Union shall be strictly secret to all outside the Union.

• • • •

5. The Union and the Company have two collective agreements, one of which covers the respondent's Material Handling, Fabrication, and Machine Shop Division, and the other of which covers its Chicago Blower Division. Apart from some differences in rates and job descriptions, the two collective agreements are substantially similar. Their effective dates are December 1, 1984 to November 30, 1987. Both contain the following mandatory membership provision:

ARTICLE 6: ASSOCIATION MEMBERSHIP

It is agreed that as a condition of employment, all employees covered by this agreement shall become and remain members of the Association.

Both collective agreements also contain the following provision:

ARTICLE 13: PROBATIONARY EMPLOYEES

- 13.01 A new employee will be termed a probationary employee and will not be considered a regular employee until he/she has worked 120 continuous work days for the Company. After completing the probationary period, the employee shall be granted seniority status dating back to his/her most recent date of hire with the Company.
- 13.02 The lay-off, failure to recall from lay-off, discipline or discharge of a probationary employee shall be deemed to have been for just cause.

Probationary employees are not excluded from the bargaining units described in either collective agreement.

6. At the commencement of their employment with the Company, probationary employees sign a form by which they request membership in the Union, authorize the Union to act as their bargaining agent, express willingness to pay an initiation fee, and authorize the Company to deduct from their last pay of every month "a sum equal to the then current dues" of the Union. Upon successful completion of their probationary period, those employees are admitted into membership in the Union, with the sums deducted from their pay during the probationary period constituting their Union initiation fee. Probationary employees have traditionally not been permitted to vote on any matters pertaining to the Association or the Union (with the possible exception of ratification of collective agreements), as they are not members. There is some conflict in the evidence concerning whether or not probationary employees have been permitted to take part in ratification votes. We find it unnecessary to resolve that conflict, as such participation is not inconsistent with the uncontradicted evidence adduced by the applicant that probationary employees are not members of the Union; section 72(5) of the Act expressly provides that "all employees in a bargaining unit, whether or not such employees are members of the trade union, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement."

7. In February of 1986, a group of Union members contacted a local of the CAW in Hamilton and expressed interest in being represented by the CAW. They were referred to Hemi Mitic, the Director of Organizing for the CAW, who subsequently met with three of the four members of the Union Executive (the "Executive") and some Union stewards, who had formed a committee (the "Committee") to advance their mutual interest in having the Union merge with the CAW. Those three members of the Executive were Alf Willson, the Union President; Ron Sisson, the Union Vice-President; and Greg Norris, the Union Secretary. Mr. Mitic arranged for a member of his staff, Jane Armstrong, who is a CAW National Representative, to assist the Committee with respect to the procedures to be followed to effect a merger.

8. With Ms. Armstrong's assistance, the Committee prepared the following notice, which was typed by a member of the CAW secretarial staff:

I.B.L. EMPLOYEES UNION

NOTICE OF SPECIAL MEETING

TO ALL MEMBERS OF I.B.L. EMPLOYEES UNION

A special general meeting of the I.B.L. Employees Union will take place on:

March 22, 1987 at 7:00 pm  
Hamilton Rescue Unit  
316 Beach Blvd.,  
Hamilton, Ont. L8H 6W4

The purpose of the meeting is to amend the I.B.L. Employees Union Constitution to permit our union to merge with another trade union. If the membership approves the constitutional amendment, a second vote will be held at the same meeting to decide whether the membership wish our union to merge with the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada).

Attached to this notice are copies of the proposed amendment to permit a merger and of the Resolution that will be presented to the meeting proposing that the I.B.L. Employees Union merge with the CAW.

Attendance at this meeting is of utmost importance as we will be deciding whether to carry on ourselves or to merge with a large Canadian trade union. Please be sure that you make every effort to attend.

I.B.L. EMPLOYEES UNION COMMITTEE

(signed) "Alf Willson"  
Alf Willson  
President

(signed) "Ron Sisson"  
Ron Sisson  
Vice President

(signed) "Greg Norris"  
Secretary

9. The proposed motions which were attached to that notice read as follows:

MOTION TO AMEND CONSTITUTION

OF

I.B.L. EMPLOYEES UNION

(pursuant to Article 8.01 of  
I.B.L. Employees Union Constitution)

BE IT RESOLVED THAT the I.B.L. Employees Union Constitution be amended by adding thereto the following as Article 19:

19 Merger

The I.B.L. Employees Union may merge, amalgamate with, and/or transfer its jurisdiction to

any other trade union by a majority vote of those members present and voting on a motion presented for that purpose at any meeting of the I.B.L. Employees Union, and will thereby dissolve its separate existence.

MOTION OF I.B.L. EMPLOYEES UNION

TO MERGE WITH

NATIONAL AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS UNION OF  
CANADA, (CAW-CANADA)

BE IT RESOLVED THAT:

The I.B.L. Employees Union merge and amalgamate with and transfer its jurisdiction to the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), and thereby dissolve its separate existence.

10. That notice and those attachments were mailed to Union members on March 5, 1986, along with the following letter:

To: THE MEMBERSHIP:

The Union Executive and all its [sic] representatives have decided that it would be in the best interest of the employees to merge with CAW-Canada. We want to secure a better future for the employees at I.B.L., now currently under contract with an expiry date of November 30, 1987.

The next contract will be very important for all of us. We need the support of the CAW.

(signed) "Alf Willson"

ALF WILLSON

President, IBL Employees Union

(signed) "Ron Sisson"

RON SISSON

Vice-President, IBL Employees Union

(signed) "Greg Norris"

GREG NORRIS

Secretary, IBL Employees Union

11. The employee addresses to which those materials were mailed were taken from an address list that Mr. Norris obtained from the respondent's office, which also provided him with a copy of the most recent seniority list available at that time. Mr. Norris took those lists to the CAW office, where he, Mr. Willson, and Ms. Armstrong reviewed them, and struck off the names of foremen, probationary employees, and other persons whom they considered to be ineligible to vote on Union matters. The notice and attachments were also posted on several bulletin boards and in various other locations throughout the respondent's plant. Those materials were posted on March 10, and remained in place until after the March 22 special general meeting (the "meeting").

12. One of the persons struck from the mailing list was Ignazio Agro, whose seniority date was May 14, 1986. Mr. Agro was laid off on January 16, 1987, and remained on lay off until he was recalled on April 20, 1987. The seniority list provided to Mr. Norris by the respondent listed Mr. Agro's status as inactive. It was Mr. Norris's understanding that laid off employees are generally listed as "active" on the seniority list. It was also his understanding that Mr. Agro was listed as inactive because he had been recalled by the Company but had not accepted the recall. However,

Robert Kranstz, who was the respondent's Plant Manager at the time of the events in question, testified that Mr. Agro did not refuse a recall. It was his evidence that Mr. Agro had merely been offered an alternative job with a different rate of pay, and had elected to remain on lay-off. He further testified that persons laid off by the Company remain employees for twelve months after their lay-off, during which period they are considered to be inactive. Notice of the meeting was not mailed to Mr. Agro, and he did not attend the meeting.

13. It appears that six other employees were also erroneously struck off the mailing list. However, four of those employees attended the meeting and received ballots. The other two, Minh Ba Hoang and Peter Morrison, did not attend. Neither of those employees attended at the hearing of this matter to complain about lack of notice of the meeting, nor were they summonsed to testify by the respondent or the objectors. In view of the evidence concerning the substantial number of notices of the meeting which were posted throughout the plant twelve days in advance of the meeting, and the fact that four of the six employees in question attended the meeting, it may reasonably be inferred that the remaining two employees also had notice of the time, date, place, and purpose of the meeting, but elected not to attend. Had they done so, we are satisfied on the balance of probabilities that they would have been permitted to vote.

14. Samuel Shelley's name appeared twice on the Company's address list as a result of a clerical or computer error. The first entry was struck off the list by the Committee because Mr. Shelley was a probationary employee. However, they inadvertently failed to strike off the second entry. Thus, notice of the meeting was mailed to Mr. Shelley, and when he attended at the meeting he was mistakenly permitted to vote. One other probationary employee, Chandrapal Singh, was also erroneously permitted to vote at the meeting as a result of a failure to strike his name from the list.

15. John Pajaczkowski was laid off by the Company on February 5, 1987, and was not recalled until April 16, 1987. However, he was classified as an active employee on the respondent's seniority list. He was sent notice of the meeting, was in attendance, and was permitted to vote. It was Mr. Kranstz's evidence that Mr. Pajaczkowski was erroneously listed as an active employee on the Company's seniority list. However, it is clear from Mr. Norris's evidence that persons on lay-off remained members of the Union as long as they were eligible for recall and, accordingly, were entitled to vote on Union matters. Thus, we find no merit in the respondent's contention that Mr. Pajaczkowski should not have been permitted to vote at the meeting.

16. Mr. Mitic and Ms. Armstrong attended the March 22 special general meeting of the Union at the request of the Committee. In order to ensure that proper procedures were followed, Ms. Armstrong sat at a table in the entry corridor, along with Dave Clewer, the Union's sergeant-at-arms, who is employed in the respondent's Chicago Blower Division, and Don Wallace, the Union's chief steward, who is employed in the respondent's other division. As employees arrived, their names were checked against three lists: an alphabetical list of all of the respondent's employees (with names of employees ineligible to vote struck out), an alphabetical list of all of the respondent's employees to whom notice of the meeting (and the other aforementioned materials) had been sent, and a seniority list. Employees whose names appeared on the second list were each given two ballots when they arrived at the meeting. One of the ballots was printed on yellow paper. The other was printed on blue paper. The yellow ballot read as follows:

OFFICIAL BALLOT

(AMENDMENT)

The IBL Employee's Union Constitution be amended as follows:

YES NO

19 Merger

The I.B.L. Employees Union may merge, amalgamate with, and/or transfer its jurisdiction to any other trade union by a majority vote of those members present and voting on a motion presented for that purpose at any meeting of the I.B.L. Employees Union, and will thereby dissolve its separate existence.

Explanation:

If you are in favour of amending the Constitution  
Put a mark in the "YES" box

If you are against amending the Constitution  
Put a mark in the "NO" box

The blue ballot read:

OFFICIAL BALLOT(RESOLUTION)

YES NO

The I.B.L. Employees Union merge and amalgamate with and transfer its jurisdiction to the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), and thereby dissolve its separate existence.

Explanation:

If you are in favour of merging with CAW-Canada  
Put a mark in the "YES" box

If you are against a merger with CAW-Canada  
Put a mark in the "NO" box

17. When probationary employees whose names had been struck off the first list arrived at the meeting, the seniority list was checked to ensure that they had not been struck off in error. Probationary employees were permitted to attend and speak at the meeting. However, with the exception of Samuel Shelley and Chandrapal Singh, who (as noted above) were mistakenly permitted to cast ballots, probationary employees were not permitted to vote at the meeting because they were not members of the Union. Copies of the CAW Constitution were made available to employees as they entered the meeting. (They were also offered CAW pens, pins, and keychains.)

18. It is clear from the totality of the evidence that emotions were running high, especially at the beginning of the meeting. After Mr. Willson called the meeting to order, Klaas Veldman, the Treasurer of the Union and the sole member of the Executive opposed to the proposed merger with the CAW, objected to the presence of Mr. Mitic on the basis that it was a meeting of the Union which Mr. Mitic was not entitled to attend as he was not a member of the Union. When Mr. Veldman attempted to move that Mr. Mitic and Ms. Armstrong be asked to leave the hall, some of the members at the back of the hall began yelling, "Let him [Mr. Mitic] talk! Let him talk!" Mr. Willson, who was chairing the meeting, told Mr. Veldman that Mr. Mitic and Ms. Armstrong had every right to be at the meeting as they had been invited to attend by the Committee. When Mr. Veldman persisted in his objections, Mr. Willson conducted a vote (by a show of hands) on the issue of whether or not Mr. Mitic should be permitted to remain at the meeting and make a presen-

tation. A substantial majority of those present voted in favour of permitting Mr. Mitic to do so. Accordingly, after speaking for a few more minutes, Mr. Willson turned the microphone over to Mr. Mitic, who addressed the meeting and responded to questions concerning the CAW. Mr. Mitic's presentation concerning the advantages of merging with the CAW and his response to questions from the floor continued for approximately two hours. Mr. Willson also answered a few questions during that period. It was then moved (and seconded) to end the debate and proceed with the voting. Although a few of the members spoke against that motion on the grounds that they had not had time to read the CAW Constitution, the motion was carried by a majority. One of the members then suggested that some people might want to mark their ballots in greater privacy. In response to that concern, they were advised that a room at the side of the hall was available for that purpose. However, it appears that no one made use of that room. The objectors' three witnesses testified that the room was inaccessible to some of the members because of the crowded condition of the hall. However, they did not suggest that this had in any way impaired their ability to express their true wishes in the vote.

19. The first ballots cast at the meeting were the yellow ballots pertaining to the proposed constitutional amendment. To conduct the vote, a ballot box which had been on the head table at the start of the meeting was taken to the persons seated in the hall and passed along each row, from person to person. Since it was getting rather late and some of the members had to leave, a motion was passed which permitted members to vote on the merger resolution (blue ballot) before the yellow ballots were counted. Under the terms of that motion, the blue ballots were not to be counted in the event that the constitutional amendment did not pass by the necessary two-thirds. Thus, the balloting on the merger resolution proceeded before the ballots on the constitutional amendment had been counted. A second ballot box was used to collect the blue ballots. After the blue ballots had been collected, the yellow ballots were counted by six members who volunteered to be scrutineers. It was the applicant's evidence that there were 159 members present at the meeting, of whom 155 cast yellow ballots. 112 of those yellow ballots were marked in favour of the constitutional amendment, 41 were marked in opposition to it, and two were spoiled. Since that motion passed by more than the two-thirds majority required by Article 8.01 of the Constitution, the scrutineers proceeded to count the blue ballots. Of the 151 blue ballots cast, 110 were marked in favour of the resolution to merge, 40 were marked in opposition to it, and one was spoiled. Thus, the majority vote required by Article 19 of the amended Constitution was obtained.

20. On March 23, 1987, Mr. Mitic sent the following telex message to John Lawson, the President of the respondent:

DEAR MR. LAWSON:

AT A MEETING HELD MARCH 22, 1987 THE IBL EMPLOYEES UNION VOTED OVERWHELMINGLY TO MERGE WITH THE CAW-CANADA. IN LIGHT OF THIS, WE WANT TO ARRANGE A MEETING WITH THE COMPANY AT AN EARLY DATE. IT IS THE DESIRE OF THE CAW-CANADA TO CO-OPERATE AS MUCH AS POSSIBLE TO MAKING SURE THIS TRANSITION IS COMPLETED SMOOTHLY IN THE INTEREST OF ALL CONCERNED.

I LOOK FORWARD TO HEARING FROM YOU REGARDING A DATE FOR A MEETING.

21. On March 24, 1987, the following letter on CAW letterhead was sent to all of the persons who had been sent notice of the meeting:

To: ALL I.B.L. EMPLOYEES

Congratulations on the decision made by the Executive Committee and members of the I.B.L.

Employees Union to merge with the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada).

Results of the Vote held on March 22, 1987 are as follows:

1st Ballot (yellow)	2nd Ballot (blue)
<i>to Amend</i>	<i>Resolution to Merge:</i>
<i>the Constitution:</i>	
112 In favour	110 In Favour
41 Opposed	40 Opposed
2 Spoiled	1 Spoiled

The CAW welcomes you as members.

We will be making an Application for Successor Rights to the Ontario Labour Relations Board shortly.

You will be part of Amalgamated Local 525.

Best Wishes.

Yours truly,

(signed) "Robert White"  
ROBERT WHITE  
President

22. Bob Tindale, a CAW National Representative who services the Hamilton area, was appointed by the applicant to assist Local 525 in respect of employees previously represented by the Union. On April 13, Mr. Tindale, Mr. Mitic, and other CAW officials met with Company representatives at the plant. At that meeting, Mr. Lawson advised the applicant that the Company was not prepared to recognize the CAW as bargaining agent for its employees without a determination by the Board that the necessary steps had been taken to merge the Union with the CAW. Accordingly, the instant application was filed with the Board later that month.

23. Respondent's counsel submitted that this application should be dismissed because notice of the meeting was not sent to probationary employees, and because they were not permitted to vote at the meeting. However, we are satisfied on the totality of the evidence that although probationary employees applied for membership in the Union at the commencement of their employment with the Company, they were not admitted into membership until they had successfully completed their probationary period. Thus, the Union was not required to give them notice of the meeting, and they were not entitled to vote at the meeting as they were not members of the Union.

24. Respondent's counsel further submitted that the application should be dismissed because of the Union's failure to mail notice of the meeting to Ignazio Agro, Minh Ba Hoang, and Peter Morrison, and because of the fact that Samuel Shelley and Chandrapal Singh, whom the Union (correctly) considered to be non-members, were permitted to vote. As noted above, it may reasonably be inferred in the circumstances of this case that Minh Ba Hoang and Peter Morrison were notified of the time, date, place, and purpose of the meeting, but elected not to attend. However, even if we were to assume that they were not notified of the meeting and that if they had been given notice they would have attended and voted against both the constitutional amendment and the proposed merger, their votes would not have materially affected the outcome of either vote. The same is true of Ignazio Agro. Moreover, it is also clear that the fact that Samuel Shelley and Chandrapal Singh were mistakenly permitted to vote at the meeting did not materially affect

the outcome of either of the two votes. If the aforementioned assumption regarding Minh Ba Hoang and Peter Morrison is coupled with an assumption that if Ignazio Agro had been notified of the meeting, he would have attended and voted against both the constitutional amendment and the proposed merger, the count in respect of the constitutional amendment would become 112 members in favour out of 162 members in attendance at the meeting (i.e., more than two-thirds of the members present), and the count in respect of the merger resolution would become 110 members in favour out of 154 members present and voting (i.e., a majority). If it is further assumed that Samuel Shelley and Chandrapal Singh each voted in favour of the constitutional amendment and the merger, the notional elimination of their ballots and their mistaken inclusion in the number of members present at the meeting would result in the count in respect of the constitutional amendment becoming 110 members in favour out of 160 members in attendance at the meeting (i.e., more than two-thirds of the members present), and the count in respect of the merger resolution would become 108 members in favour out of 152 members present and voting (i.e., a majority).

25. The Board and the Courts have explicitly recognized in the context of trade union mergers that the law will relieve against mere technical deficiencies where there has been substantial compliance with the spirit of constitutional provisions: see, for example, *L.M.L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252, at paragraph 30, and *Re McGhie et al. and Canadian Air Line Flight Attendants' Association et al.* (1986), 58 O.R. (2d) 333. In the instant case, we are satisfied on the totality of the evidence that the lack of mailed notice to Ignazio Agro, Minh Ba Hoang, and Peter Morrison was, at most, a technical deficiency, in the context of a case in which notice of the meeting, together with copies of the aforementioned attachments, were posted on several bulletin boards and in various other locations throughout the plant twelve days in advance of the meeting, and in which their non-attendance at the meeting did not materially affect the votes which were conducted at that meeting. The same is true of the erroneous issuance of ballots to Samuel Shelley and Chandrapal Singh.

26. Counsel for the respondent also submitted that the application should be dismissed on the basis of non-compliance with Article 16(22) of the By-laws, which provides that "[a]ll business done in the Union shall be strictly secret to all outside the Union." It was his contention that the presence of Mr. Mitic and Ms. Armstrong at the meeting violated that provision. However, we find no merit in that contention. To construe that provision as precluding the Union from inviting informed guests to address the membership and assist the Union regarding a matter of importance would be a patently unreasonable construction of that provision. Moreover, as noted above, Mr. Willson's view that Mr. Mitic and Ms. Armstrong were entitled to be present at the meeting, and that Mr. Mitic should be permitted to address the meeting, was tested and sustained by a vote conducted by the Chairman of the meeting, in response to concerns raised by Mr. Veldman. In that regard, we are not persuaded that the meeting did not comply with the Constitution and By-laws, as contended by counsel for the objectors. Although emotional outbursts by some of the members at the beginning of the meeting created a situation in which Mr. Veldman's initial motion that Mr. Mitic and Ms. Armstrong be asked to leave the hall was not entertained, Mr. Willson's continued objection to their presence in the face of a ruling by Mr. Willson that they were entitled to be present at the meeting (and that Mr. Mitic should be permitted to address the meeting) was resolved by a vote of the members present at the meeting. We also find nothing untoward about the role which Mr. Mitic and Ms. Armstrong played at the meeting, and the manner in which the balloting was conducted.

27. Having regard to the totality of the evidence and the submissions of counsel, we are satisfied that the Constitution was duly amended at the March 22, 1987 meeting so as to add the merger provision (Article 19) set forth above, and that the aforementioned merger resolution was

also duly passed at that meeting (see, generally, *Zehrs Markets Division of Zehrmart Limited*, [1977] OLRB Rep. Oct. 637, and *Peerless Plastics Limited*, [1978] OLRB Rep. Sept. 848).

28. For the foregoing reasons, the Board, pursuant to section 62 of the *Labour Relations Act*, hereby declares that by reason of a merger, amalgamation, or transfer of jurisdiction, the applicant has acquired the rights, privileges, and duties under the Act of its predecessor, the I.B.L. Employees Union.

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**0701-87-R; 0702-87-R** Ontario Catholic Occasional Teachers' Association, Applicant v. **The Lakehead District Roman Catholic Separate School Board**, Respondent; Ontario Catholic Occasional Teachers' Association, Applicant v. **The Nipissing District Roman Catholic Separate School Board**, Respondent

**Certification - Practice and Procedure - Pre-Hearing Vote - Union requesting copy of the mailing list supplied by the employer to the Board for occasional teacher pre-hearing vote - Request allowed - Further requests to be honoured by the Registrar without reference to the Board**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

**DECISION OF THE BOARD;** September 9, 1987

1. By decisions dated July 23, 1987, in each of these matters we directed that a pre-hearing vote be conducted and that the Board's notice of the vote be given by mail to the persons whom the parties had identified as eligible voters. In order to facilitate the Board's giving notice in that manner we further directed that the respondent supply the Board with mailing labels containing the names and last addresses known to the respondent of all of the persons on the voters lists. By letter dated August 27, 1987, an official of the applicant has asked the Registrar for "a copy of the mailing list supplied by the employer to the OLRB" in each of these applications. Having regard to the Board's decision in *Queen's University*, [1987] OLRB Rep. June 925, the Registrar has referred that request to us.

2. For some time now, the Board has been requiring that respondents to pre-hearing vote certification applications involving occasional teachers provide names and address labels to assist the Board in communicating with affected persons. In *Board of Education for the City of York*, [1985] OLRB Rep. May 767, the Board addressed the question whether an applicant for certification with respect to a unit of occasional teachers should have access to the information supplied to the Board. It concluded that:

74. For the reasons then, when an application for certification in respect of occasional teachers is made under section 9 of the Act (the pre-hearing vote section), or a vote of occasional teachers is directed under section 7, the respondent employer will be required to file with the Board a list of the names and addresses of all employees known to it to be in the voting constituency. *Such list will be available to any person or party with a direct interest in the campaign.* Since this is admittedly a new rule in the test case, we are satisfied that it should be applied prospectively only. Further, since most of the occasional teachers will be geographically dispersed, and have

no need to visit a particular school, the representation vote should ordinarily be conducted by means of a mailed ballot.

[emphasis added]

An applicant trade union is clearly a party with a direct interest in the pre-vote campaign. The intent of this new rule was that the lists would be available through the Board after they are filed.

3. The Board went a step further in *Scarborough Board of Education*, [1986] OLRB Rep. Mar. 361. There, the applicant for certification with respect to a unit of occasional teachers requested that the respondent be ordered to copy the applicant directly with the mailing list when that list was filed with the Board. After entertaining the submissions of the parties, the Board made the order requested by the applicant. It did not, however, announce as a rule of general application that such an order would be made in every case.

4. In *The Halton Roman Catholic Separate School Board*, [1986] OLRB Rep. July 962 the Board abandoned the general rule that balloting in occasional teacher representation votes be conducted by mail, but noted that

The Board's policy that notice of the vote be given by mail to eligible voters and that the names and addresses of those voters be given to the applicant are unaffected by this decision.

5. *Queen's University at Kingston*, [1987] OLRB Rep. June 925 (reconsideration denied by decision dated June 26, 1987) involved an application for certification with respect to the respondent university's full time "support staff." The applicant had requested that a pre-hearing vote be taken. In accordance with the Board's usual practice, after the application was filed a labour relations officer was appointed to confer with the parties with respect to, among other things, all matters relating to the conduct of any pre-hearing representation vote. After that conference had taken place, the applicant wrote to the Board asking that it

direct the respondent to make available to [the applicant] and the intervener a list of names and mailing addresses of all employees in the voting constituency.

The application in that case did not involve occasional teachers. At the parties' meeting with the officer there had been no question of the Board's giving notice by mail, nor any other reference to anyone's needing the addresses of persons named on the voters list for any purpose. In those circumstances, the applicant was raising a novel issue with respect to the conduct of a pre-hearing representation vote for the first time after the meeting with the labour relations officer, without having raised the issue at that meeting. For reasons set out in its decision, the Board concluded that it should not and would not entertain the request when it had not been raised at the meeting with the labour relations officer.

6. Here the applicant is not asking that the respondent be ordered to do anything. It is unnecessary for the Registrar to inform the respondent and invite its comments before acting on the request. The rule announced in *City of York Board of Education*, *supra*, is that in occasional teacher cases, all interested parties will have access to mailing lists supplied to the Board by respondents. That rule applies to each such case unless the Board specifically directs otherwise. For the very reasons given in *Queen's University at Kingston*, *supra*, any request that the Board specifically direct that the applicant *not* be given access to the mailing list must be raised at the meeting with the labour relations officer held in connection with the application in question. As no such request was made at the meeting in either of these applications, the general rule applied to each of them. For these reasons, on September 4, 1987, we endorsed the record in each of these matters as follows:

For reasons which will be set out in a formal decision, it would be proper for the Registrar to supply the applicant with copies of the mailing lists supplied by the respondent in this matter, as requested in the applicant's letter of August 27th, 1987.

We would add that when a similar request is made in any other occasional teacher application in which mailing lists have been supplied to the Board, it may be honoured by the Registrar without reference to the Board unless the Board has otherwise expressly directed with respect to that particular application.

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**0250-87-R; 3291-86-R; 3457-86-R** United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Mollenhauer Limited**, Respondent v. Labourers International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Ellis-Don Limited**, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. The Form Work Council of Ontario, Intervener #2 v. Metropolitan Toronto Apartment Builders Association, Intervener #3; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Milne & Nicholls Ltd.**, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2

**Evidence - Practice and Procedure - Respondent objecting to the scope of a summons on the basis that the documents required are irrelevant - Law on production of documents through a summons reviewed - Order to bring documents to next hearing**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *P. Grasso*.

**APPEARANCES:** *Douglas J. Wray* and *David McKee* for the applicant; *W. Thornton* for the respondents; *A. M. Minsky* for Intervener #1 and The Form Work Council of Ontario; *Doug Gilbert* for the Metropolitan Toronto Apartment Builders Association.

**DECISION OF THE BOARD;** September 8, 1987

1. In the course of these proceedings the applicant caused a summons to be served on Mr. Harold Green and another on Mr. Michael Reilly. In addition to commanding Mr. Green to attend before the Board, the summons requires him to bring with him:

1. All collective agreements between Local 183, Labourers' International Union of North America (hereinafter referred to as "Local 183") and the Metropolitan Toronto Apartment Builders Association (hereinafter referred to as "the MTABA") with respect to the House Builders or other employers employing persons in the residential sector of the construction industry other than persons employed in the construction of Apartment Buildings.
2. With respect of all collective agreements of any type whatsoever between the MTABA and Local 183 from 1969 until the present time:

- i) all proposals made by either party for amendment or renewal of any agreement, whether during renewal negotiations or at any other time;
  - ii) all notes made by any representative of the MTABA during collective bargaining between the MTABA and Local 183 for the amendment or renewal of any collective agreement.
- 3. All collective agreements between any member of the MTABA and any trade union or council of trade unions other than Local 183 covering any work in the construction industry other than work in the I.C.I. sector.
- 4. All certificates, recognition agreements, correspondence, memoranda, or other document, whatsoever with respect to bargaining rights held by Local 283 for any member of the MTABA.
- 5. Any correspondence, agreement, memoranda, or other document whatsoever between the MTABA and the Toronto Housing Labour Bureau (hereinafter referred to as the "THLB"), and any notes of discussions between the officers or agents of the MTABA and the THLB.
- 6. Any proposals, notices, or other documents with respect to the MTABA "House Builders" Collective Agreement with Local 183, expiring 30 April, 1983 and the renewal or amendment thereof, in the possession of the MTABA.

Mr. Reilly's summons requires him to bring with him:

- 1. All collective agreements between Local 183, Labourers' International Union of North America (hereinafter referred to as "Local 183") and the Metropolitan Toronto Apartment Builders Association (hereinafter referred to as "the MTABA") with respect to House Builders or other employers employing persons in the residential sector of the construction industry other than persons employed in the construction of Apartment Buildings.
- 2. With respect to all collective agreements of any type whatsoever between the MTABA and Local 183 from 1969 until the present time:
  - i) all proposals made by either party for amendment or renewal of any agreement, whether during renewal negotiations or at any other time; and
  - ii) all notes made by any representative of Local 183 during collective bargaining between the MTABA and Local 183 for amendment or renewal of any collective agreement

relating to the scope of the collective agreement including the employees, work, jurisdiction or classification to be covered by the collective agreement, and any proposals relating to subcontracting.

- 3. All certificates, recognition agreements, correspondence, memoranda, or other document whatsoever with respect to bargaining rights held by Local 183 for any member of the MTABA.
- 4. Any proposals, notices, or other documents with respect to the MTABA "House Builders" Collective Agreement with Local 183, expiring 30 April 1983 and the renewal or amendment thereof, in the possession of Local 183.
- 5. All collective agreements, letters of understanding, ancillary agreement and correspondence or other documents with respect to the terms of the [sic] any collective agreement with the Toronto Housing Labour Bureau (hereinafter referred to as the "THLB") and Local 183.
- 6. All bargaining proposals, and notes of collective bargaining, between the THLB and

Local 183 for the purpose of renewing or amending any collective agreement, between the THLB and Local 183 relating to the scope of the collective agreement including the employees, work, jurisdiction or classifications to be covered by the collective agreement any any proposals relating to subcontracting.

2. The Metropolitan Toronto Apartment Builders ("the MTABA") objects to the scope of the summons to Mr. Green on the basis that the documents referred to in paragraph 2 of the list, of which only documents relating to the most recent round of negotiations are apparently available, are irrelevant because they relate to matters that occurred subsequent to the date that this application was made. The MTABA asserts that paragraph 4 is overly broad in its scope and constitutes a "fishing expedition" by the applicant. The MTABA objects to the demand that Mr. Green produced the documents referred to in paragraph 5 on the basis that these are irrelevant to the issues before the Board in this proceeding. Counsel for the MTABA submits that the Board should be sensitive to the nature of documents and information of the kind requested in paragraphs 2, 4 and 5 and should not lightly require that these be produced.

3. The Labourers' International Union of North America, Local 183 ("Local 183") objects to the lack of specificity with respect to the documents that the summons to Mr. Reilly directs he bring with him. Local 183 does not object to the production of those "high-rise" collective agreements between it and the MTABA that were in effect at or prior to the date that this application was made or the documentation with respect thereto. It does, however, object to the demands in paragraphs 1, 2, 4, 5 and 6 insofar as these relate to any other or subsequent collective agreement on the basis that these are irrelevant. Counsel for Local 183 submits that the general wording of the summons shows that the applicant is on a "fishing expedition" and, accordingly, is an abuse of process. He further asserts that the wording is so broad that Mr. Reilly cannot reasonably be expected to know what it is that he must bring with him.

4. The Board has the power to compel the production of documents pursuant to section 103(2)(a) which provides:

103(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

The production of documents is commonly accomplished through a summons directing a person to attend before the Board and bring with him/her "specified" documents or things. This is often referred to as a subpoena *duces tecum*. The Board's power to compel the production of documents is a significant one and must therefore be exercised circumspectly, particularly where those documents relate to the preparation for or conduct of ongoing negotiations for a collective agreement. Accordingly, a subpoena *duces tecum* is not to be used as a search warrant or to permit a party to search for a case of which it has no knowledge (that is, conduct a fishing expedition) (see *The Becker Milk Company*, [1974] OLRB Rep. Oct. 732; *Dinnerex Incorporated*, [1985] OLRB Rep. March 398; *Shaw-Almex Industries Limited*, [1984] OLRB Rep. April 659; *Re Bell Canada and Communications Workers of Canada* (1980), 25 L.A.C. (2d) 200 (P. Picher)).

5. A subpoena which requires the person summoned to bring documents to a hearing with him/her must specify with as much precision as possible the particular documents demanded. The specificity with which documents must be described will depend on what is fair and reasonable in the circumstances. In this regard, it is appropriate to consider whether the documents are identi-

fied with sufficient particularity to enable the person summonsed to identify what is required, whether the party issuing the summons has had an opportunity to examine beforehand or otherwise ought reasonably to be aware of the documents, the witness' familiarity with the documents, the scope of the proceedings, and the purpose for which the documents are sought (see *Dalgleish and Basu*, 51 D.L.R. (3d) 309 (Sask.Q.B.)). In civil proceedings in the District and Supreme Courts of Ontario, the rules of civil procedure provide for extensive discovery of documents both by affidavit and pre-trial examination. That is not the case in proceedings before the Board (except in applications under section 40a and section 91 of the Act where the Board's Rules of Procedure and practice provide for a form of discovery). Consequently, proceedings before the Board are not analogous to civil proceedings in the courts and the Board must be careful not to impose restrictions which, though appropriate in the courts, are not necessarily so in proceedings before the Board. Although there is a difference between the production of documents and the discovery of documents, the distinction between them is somewhat blurred in proceedings before the Board where it is inevitable that some discovery will and must go on through a subpoena *duces tecum*. It is therefore appropriate for the Board to take the broader approach that it has adopted to the production of documents pursuant to a subpoena *duces tecum*. In our view, a party seeking production of documents through a summons need not demonstrate any more than that the documents sought are arguably relevant to the matters in issue (*Dinnerex Incorporated*, *supra*; *Shaw-Almex Industries Limited*, *supra*; *The Becker Milk Company Limited*, *supra*).

6. The three applications before us are being heard together with respect to the issues that are common to all three; that is, the status of the interveners to participate in the proceedings and the description of the unit of employees of the respondent to each application that is appropriate for collective bargaining. To deal with the former issue, the Board will have to interpret and apply a collective agreement dated May 9, 1985, between the MTABA and Local 183 ("the MTABA agreement"). Deciding the latter issue may also involve the interpretation and application of the MTABA agreement. There is also a collateral issue relating to the interpretation and application of the MTABA agreement; that is, the admissibility of extrinsic evidence relating to the history of the collective bargaining leading to, and the application of, the MTABA agreement. Although the applicant opposes the introduction of such evidence, the procedure adopted by the Board, on agreement of the parties, is that the evidence will be heard and the issue of its admissibility dealt with in final argument. Indeed, the Board has already heard some of this extrinsic evidence and each of the series of MTABA agreements have been made exhibits. In addition, Local 183 (and the Form Work Council of Ontario) has submitted a brief of documents which includes a collective agreement between the Toronto Housing Labour Bureau and Local 183 dated May 1, 1985, a collective agreement between the Residential Framing Contractors Association of Metropolitan Toronto and Vicinity Inc. and Local 183 dated May 2, 1985, and a collective agreement between the Ontario Form Work Association and the Form Work Council of Ontario dated July 16, 1985.

7. Having taken the positions that they have, and seeking, as they do, to rely on extrinsic evidence relating to the MTABA agreement and (presumably) to the other collective agreements which have been submitted, though not yet proved, it is not now open to either the MTABA or Local 183 to refuse to produce the documents that relate to the history of the collective bargaining leading thereto insofar as these may be relevant to the issues before the Board. Mr. Green has been called as a witness by the MTABA. He has yet to be cross-examined by the applicant. In our view, it would be quite proper for counsel for the applicant to cross-examine Mr. Green with respect to the existence of such documents and to require their production if they exist. It is unclear whether Local 183 intends to call Mr. Reilly as a witness. If it does do so, the comments made with respect to the cross-examination of Mr. Green apply equally to him. Whether or not he is called, however, has little bearing on the issue of production of documents. As the Board noted in *Shaw-Almex Industries Limited*, *supra* at paragraph 19:

Although the custodian of a document is described as a witness in the context of the issuance of enforcement of a summons *duces tecum*, it is not necessary for the party seeking the document to call that person as its witness. The person summoned may be called upon to say whether the document described in the summons exists and, if they do, to produce them without first being sworn. Upon production being made, the party seeking production is entitled to prove the documents through some other witness: see *Heart Construction Co. Ltd.*, [1983] OLRB Rep. Jan. 84, and the authorities referred to therein. Production pursuant to the summons therefore precedes the attempted introduction of those documents into evidence. The witness through whom the attempt is made need not be the custodian, nor need he necessarily be a witness called by the party seeking production. Indeed, it may be that no witness is necessary when, for example, some statutory provision permits or the document's relevance springs entirely from the fact that it was in the possession of the person producing it. In any event, the party attempting to introduce a document into evidence must necessarily see it before the attempt is made. Others may have to see it, in order to intelligently resolve any dispute over its admissibility. The contents of a party's confidential documents may thus become known to others before the documents are admitted in evidence. Documents so produced may sometimes not be admitted or, if circumstances warrant, admitted only *in camera* (see section 9, *Statutory Powers Procedure Act*, R.S.O. 1980, c.484). In our view, there is an implied undertaking by a party to whom documents are produced as a result of the use of a summons *duces tecum* issued by the Board. It is an undertaking to the Board as much as to the party from whom production is compelled. The undertaking is that the documents will not be used for collateral or ulterior purposes. The undertaking is similar in scope and effect to the undertaking discussed in the cases cited above. Breach of the latter undertaking is a contempt of court, as is the breach of any undertaking given to a court. By virtue of section 13(c) of the *Statutory Powers Procedures Act*, breach of an undertaking to the Board may be the subject of contempt proceedings in the Supreme Court of Ontario; that court's power to punish for "contempt of the Board" is not limited to cases of failure of witnesses to attend, testify or produce documents: *Re Ajax and Pickering General Hospital et al. and Canadian Union of Public Employees et al.* (1981) 32 O.R. (2d) 492 (Ont. Div. Ct.); reversed on other grounds at (1982) 35 O.R. (2d) 293; 82 CLLC ¶14,164 (Ont. C.A.).

8. In our view, the documentation relating to the negotiations with respect to the MTABA agreement and the collective agreements between Local 183 and the Toronto Housing Labour Bureau, Local 183 and the Residential Framing Contractors Association of Metropolitan Toronto and Vicinity Inc. and the collective agreement between the Ontario Form Work Association and The Form Work Council of Ontario, or the application thereof, are at least arguably relevant on the basis of the positions taken by the MTABA and Local 183. The purpose for which the documents are sought, namely to test the assertions and evidence of the MTABA and Local 183, is perfectly legitimate. Nor are many of the documents likely to be particularly sensitive in that it seems unlikely that many of them will relate to ongoing negotiations. Even if they do, however, the nature of these proceedings is such that justice and the balance of convenience favour production. Further, the applicant has not had an opportunity to examine the documents demanded beforehand and cannot reasonably be expected to be aware of them or their existence. We note also that both Mr. Green and Mr. Reilly are familiar with both the issues in these proceedings and with the documentation being requested. In our view, their familiarity is sufficient to permit them, particularly with the assistance of their counsel, to identify the documents being requested. If there is doubt with respect to the relevance of any document(s) they can (and should) be produced to the applicant which may be able to assist in determining their relevance. Ultimately, of course, it is for the Board to determine what evidence, either documentary or otherwise, is relevant. The fact that the production of a great many documents may be required is not a relevant consideration. Either the documents are arguably relevant, in which case they must be produced, or they are not, in which case they need not be produced.

9. On the other hand, some of the language used in the two summons is too broad having regard to the scope of these proceedings. Accordingly, Mr. Green is directed to bring with him the following documents (which term means all records, notes, memoranda, or other notation) to the next scheduled hearing:

- a) all collective agreements between Local 183 and the MTABA with respect to house builders or other employers employing persons in the residential sector of the construction industry other than persons employed in the construction of apartment buildings;
- b) all documents in the possession or power of the MTABA which relate or refer to the scope of any collective agreement between it and Local 183, including the employees, work, jurisdiction, classifications, or subcontracting thereunder;
- c) all documents relating to bargaining rights held by Local 183 with respect to the MTABA or any member thereof that are in possession or power of the MTABA;
- d) all documents relating to any communication between the MTABA and the Toronto Housing Labour Bureau that relate to the scope of either the MTABA agreement or the agreement between Local 183 and the Toronto Housing Labour Bureau.

Mr. Reilly is directed to bring with him to the next scheduled hearing:

- a) all collective agreements between Local 183 and the MTABA with respect to house builders or other employers employing persons in a residential sector of the construction industry other than persons employed in the construction of apartment buildings;
  - b) all documents in the possession or power of Local 183 which relate or refer to the scope of any collective agreement between it and the MTABA, including the employees, work, jurisdiction, classifications, or subcontracting thereunder;
  - c) all documents relating to bargaining rights held by Local 183 with respect to the MTABA or any member thereof that are the possession or power of Local 183; and
  - d) all collective agreements and documents referring or relating to the scope thereof (including the employees, work, jurisdiction, classifications, or subcontracting thereunder) between Local 183 and the Toronto Housing Labour Bureau, Local 183 and the Residential Framing Contractors Association of Metropolitan Toronto and Vicinity Inc., and between the Ontario Form Work Association and The Form Work Council of Ontario that are in a possession or power of Local 183.
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**1573-86-U Great Lakes Fishermen and Allied Workers' Union, Complainant v. 538391 Ontario Limited c.o.b. as Peralta Foods - Ilda C., and Vito Peralta, Respondents**

**Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - Fishing boat captain and crew laid off at height of fishing season during an organizing drive - Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act - Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate - Compensation awarded for one fishing season - President of corporate respondent personally liable**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *J.A. Rundle* and *H. Peacock*.

**APPEARANCES:** *Paul Falzone* and *Mike Darnell* for the complainant; *R.G. McLister* and *Vito Peralta* for the respondent.

**DECISION OF THE BOARD;** September 24, 1987, as amended October 7, 1987

1. The name of the corporate respondent is amended to "538391 Ontario Limited c.o.b. as Peralta Foods - Ilda C". (For ease of reference, that respondent is also referred to in this decision as the "Company".)
2. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the "Union") alleges that Antonio Santos, Antonio Fialho, Jose Palhaca, Jose Coutinho, Ildebrando Guardado, Joao Borda D'Agua, and Joaquim Paparola have been dealt with by the respondent contrary to sections 66, 70, and 79 of the Act.
3. During the thirteen days of hearing which were devoted to this complaint, the Board heard the evidence of sixteen witnesses. In addition to that oral testimony, the Board also has before it 34 exhibits which were entered during the course of these proceedings. It is unnecessary to detail that testimony and the contents of those exhibits. It is sufficient to note that in making the findings of fact set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the submissions of the parties concerning that evidence, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and considered the inferences that may reasonably be drawn from the totality of the evidence.
4. The respondent corporation is a fishing company owned by Vito Peralta and his father, Salvatore Peralta. Since the latter is retired and does not play an active role in the operation of the Company, it is directed, managed, and controlled by its President, Vito Peralta. The Company's major asset is a fishing vessel named the "Ilda C". Vito Peralta and Salvatore Peralta agreed to purchase that boat and its fishing gear from Adriano Codinha, the owner of Saco Fisheries Limited, in August of 1983. The respondent corporation was incorporated in September of 1983 to provide a corporate vehicle through which that purchase could be carried out. However, the sale was not completed until December of that year, when the (Ontario) Ministry of Natural Resources (the "MNR") approved the transfer of fishing licence CHO342 ("342"), which had historically been fished by the "Ilda C". That licence was transferred to Vito Peralta and Salvatore Peralta personally, rather than to the Company. Nevertheless, the income generated by means of that

licence has been included in the Company's financial statements, and it has been treated by its owners as an asset of the Company at all material times.

5. Although it was initially contemplated that the Company would show a profit, the imposition of quotas on various species of fish by the MNR (in March of 1984) prevented the Company from generating sufficient revenue to be profitable. During the summer of 1985, the Company's accountant recommended that Vito Peralta and Salvatore Peralta liquidate the Company's assets and terminate its operations. However, it is apparent from the totality of the evidence that the Company's profitability was not their only concern. At all material times, Vito Peralta and Salvatore Peralta also each owned (through a holding company) a fifty per cent interest in Etna Foods of Windsor Limited ("Etna"), which employs over sixty persons to process the fish caught by the "Ilda C" and approximately nineteen other boats, including others (the "Peralta boats") in which members of the Peralta family have a financial interest. Etna is profitable, but needs reliable sources of fish in order to maintain its profitability. Thus, Vito Peralta decided that the "Ilda C" would continue to operate in 1986 notwithstanding its unprofitability. Two other Peralta boats were also on the water during the 1986 fishing season: the "Mummery Brothers" and the "F.B. Clay". (Three other Peralta boats did not fish that year: the "Leanic", the "Mar Paula", and the "Lee Jay".)

6. Antonio Santos is an experienced fishing boat captain, who obtained a captain's licence in Portugal in 1968. He came to Canada in 1976. After working as a fisherman for approximately three months, Mr. Santos went to Ohio, where he served as the captain of a fishing vessel for four years. After that he returned to Canada and captained the "A.B. Hoover" for (Mr. Codinha's) Saco Fisheries Limited for three fishing seasons (1981, 1982, and 1983). In 1984, Mr. Santos became the captain of the "Bessy Ann". He remained the captain of that boat until it stopped fishing in the late summer or early fall of 1985, when its quota for that year was exhausted. Mr. Santos was introduced to Vito Peralta a few months later by Mr. Borda D'Agua. Through discussions between Messrs. Peralta and Santos in November of 1985, it was agreed that Mr. Santos and his crew would go out on the "Ilda C" for two or three weeks to fish the remainder of the (1985) bass and pickerel quotas on 342.

7. There are a number of conflicts in the evidence concerning the arrangements which were made between Vito Peralta and Antonio Santos during the winter of 1985-86 regarding the 1986 fishing season. Some of those conflicts undoubtedly resulted from the difficulties which they encountered in communicating with each other, due to the fact that Mr. Santos speaks Portuguese and knows very little English, while Mr. Peralta speaks English and Italian but knows very little Portuguese. On some occasions they were assisted in their communications by Tony Fialho (a deckhand on the "Ilda C", and one of the grievors in this complaint), Paula Santos (Antonio Santos' daughter), or Anna Caradonna (Vito Peralta's sister, and a bookkeeper employed by various Peralta companies), each of whom served as an interpreter for them from time to time. We do not propose to detail the voluminous evidence which was adduced regarding those communications. It suffices to observe that we found neither the testimony of Antonio Santos nor the testimony of Vito Peralta to be completely reliable with respect to those communications, and various other matters pertinent to this complaint. Both of them appeared to us to be significantly influenced, in their recollection and recounting of events, by self-interest and by a strong desire to defeat the other's case. Ms. Caradonna also did not impress us as being entirely candid with respect to some matters, such as Vito Peralta's instructions to Mr. Santos concerning the fishing of the licences described below. We found Paula Santos to be a truthful witness, but her evidence is of limited value because her ability to recall a number of the pertinent details was rather limited. Tony Fialho, although also influenced to some extent by his personal stake in these proceedings, impressed us as a relatively candid and credible witness. Accordingly, we have generally relied upon his testi-

mony in resolving conflicts between it and the testimony given by one or more of the aforementioned individuals. We also found Dolores Elias, another Peralta bookkeeper, to be a relatively reliable witness.

8. Having regard to the totality of the evidence, we find that through various discussions during the winter of 1985-86, Vito Peralta and Antonio Santos agreed to the following arrangements for the 1986 fishing season. Mr. Santos would captain the "Ilda C" with a crew of six other persons. Mr. Peralta would make available to Mr. Santos and his crew three licences: 342, a Kent County licence which (as described above) was the licence historically fished by the "Ilda C"; CHO211 ("211"), a Kent County licence owned by Salvatore Peralta, Vito Peralta, and his brother, Jerry Peralta, that had historically been fished by the "Leanic" (which was being taken out of the water in 1986 for a major retrofit); and AY265, an Elgin County licence. Under the terms of that arrangement, Mr. Santos and his crew were to receive forty-two per cent of the proceeds derived from the sale (to Etna) of the fish caught by them under those licences. That forty-two per cent was to be divided equally among the captain and his crew members. Etna was also to pay a packing charge of three cents per pound, with half of the packing charge being divided equally among the captain and the crew, and the other half going directly to the captain. In addition, the captain was to receive a five per cent "captain's bonus" at the end of the fishing season.

9. Licence 342 was placed aboard the "Ilda C" in March of 1986. After Mr. Santos and his crew had been fishing under that licence for about a month, Mr. Santos approached Vito Peralta (with Mr. Fialho along as an interpreter) to ask about 211. Mr. Peralta, who was surprised to hear that it was not already aboard the "Ilda C", instructed the office staff to locate 211 and give it to Mr. Santos. Since they were unable to find the licence at that time, Mr. Santos came back for it on the following day. Although Mr. Peralta and Ms. Caradonna testified that they were the ones who gave 211 to Mr. Santos, and that he was given instructions at that time by Mr. Peralta concerning how he was to fish it, we prefer the evidence of Ms. Elias and Mr. Santos that it was Ms. Elias who gave Mr. Santos 211.

10. Mr. Santos told the Board that AY265 was also placed aboard the "Ilda C" at or about that time. However, we do not find that evidence to be reliable. We are also unable to give credence to his testimony that Mr. Peralta subsequently told him to bring AY265 ashore. His testimony in chief concerning that matter was that Mr. Peralta gave him that direction in the Etna office during the first week of August, in the course of a conversation in which Mr. Peralta asked him if the crew had signed for the Union, told him that Messrs. Fialho, Guardado, and Palhaca were the ones who were speaking most for the Union, and also told him that if he (Mr. Santos) wanted to fire them, he could do so. However, in cross-examination, Mr. Santos testified that the conversation occurred in July, while he was weighing fish in the factory. Moreover, in describing the conversation during cross-examination, he made no mention of Mr. Peralta having said during the course of that conversation that Messrs. Fialho, Guardado, and Palhaca were the ones speaking most for the Union, and that if he wanted to fire them he could do so. Those inconsistencies, combined with our general assessment of his lack of credibility and his tendency to modify or embellish his evidence with a view to advancing the Union's case, have led us to conclude that no weight can be given to that part of his evidence.

11. Vito Peralta testified that it was his intention that the "Ilda C" should exhaust the bass and pickerel quotas on 342, then utilize the bass and pickerel quotas on 211, then use the perch quota on 342, and then proceed to fish all of the quotas that remained uncaught under licence 211. He also told the Board that his desire to have 342 fished first was based upon the fact that he had a fifty per cent interest in that licence (and only a one-third interest in 211), and the fact that fish prices are generally higher earlier in the fishing season. However, some doubt is cast upon the

validity of that second reason by the testimony of Adriano Codinha, who was called as a reply witness by the respondents. When he was asked (by respondents' counsel) what the best parts of the (fishing) season were for fishing perch, he replied, "Spring and fall." He was then asked, "Is one generally better than the other?", to which he responded, "The fall, because the price is generally better." (He was not asked about the price of other species.)

12. It was Mr. Peralta's evidence that Mr. Santos was aware of the order in which he wanted to have the quotas under the two licences fished. However, we are satisfied on the totality of the evidence that Mr. Santos was unaware of Mr. Peralta's wishes in that regard. In reaching this conclusion, we have considered all of the circumstances, including the improbability that Mr. Santos would intentionally disregard such instructions when he was aware that the Company received written reports on a daily basis indicating (among other things) the poundage of each species caught and the licence under which it was caught, and was also aware that the bookkeepers kept careful track of that information. (In the circumstances of this case, we find it unnecessary to determine whether Mr. Santos' lack of awareness of Mr. Peralta's intentions regarding the licences resulted from a failure by Mr. Peralta to provide Mr. Santos with adequate instructions, or a failure by Mr. Santos to comprehend what he was told by Mr. Peralta.)

13. On August 14, 1986, Mr. Santos sent Mr. Fialho into the Etna office to enquire about how much perch remained uncaught under the quotas on 342 and 211. Mr. Santos joined Mr. Fialho in the office a moment later. When she received such requests, Ms. Elias would provide the information on the day of the request if she was not too busy, or would provide it on the following day if she did not have time to do so on the day of the request. When Mr. Santos made that request through Mr. Fialho on August 14, Vito Peralta, who overheard the request, asked Ms. Elias to assemble the requested information right away. Five or ten minutes later she handed Mr. Peralta a sheet (Exhibit 9 in these proceedings) which contained the following information concerning pounds of perch caught and pounds of perch left to be caught on the two licences:

	Quota to catch	caught	left to catch
CH342			
Perch	80978	20479	60499
CH211	74157	62670	<u>11487</u>
			<u>71986</u>

After looking at the sheet, Mr. Peralta placed it on the counter in front of Messrs. Fialho and Santos, and explained what had been caught and what was left to catch on the licences. When Exhibit 9 was placed before Mr. Peralta during his cross-examination by Union counsel, he told the Board that he did not think that he had ever seen it before. However, we do not find his evidence in that regard to be credible, and we are satisfied on the totality of the evidence that by August 14, if not before, Mr. Peralta was aware that Mr. Santos and the "Ilda C" crew had been catching perch primarily under 211 rather than 342. His failure at that time to make any suggestion to Mr. Santos that Mr. Santos had not been following his instructions indicates that Mr. Peralta did not consider it to be a matter of much significance.

14. The Union applied for certification as bargaining agent for the captain and crew of the "Ilda C" on July 23, 1987 (Board File No. 1292-86-R). In that application, the Union requested that a pre-hearing vote be conducted. The respondent received notice of that application from the Board in early August, and subsequently filed a reply to it. On August 15, 1985, at the pre-hearing

vote meeting which was conducted by a Board Officer in respect of that application and the Union's application for certification pertaining to the two other Peralta boats which were on the water in 1986, Vito Peralta learned that everyone on the "Ilda C" (i.e., Mr. Santos and the other six grievors) had signed Union cards. He was also apprised at that meeting that four employees on the "Mummery Brothers" and four of the employees on the "F.B. Clay" had signed Union cards. (In his cross-examination by Union counsel, Mr. Peralta conceded that he "got the numbers that day" in respect of the "F.B. Clay" and the "Mummery Brothers", but also stated, "I don't recall what the numbers were." We do not find that statement to be credible; it is but one of several instances in which Mr. Peralta displayed a "convenient memory", by feigning forgetfulness in respect of matters which he perceived to be potentially harmful to the respondents' case.)

15. It was (and is) the Company's position in the certification proceedings that Mr. Santos should be excluded from the bargaining unit on the ground that he (allegedly) exercises managerial functions. After becoming aware at the pre-hearing vote meeting that Mr. Santos and all of his crew had joined the Union, Mr. Peralta telephoned Mr. Santos at home and told him that he was a member of management and was not supposed to join the Union. It was Mr. Santos' evidence that during that conversation, Mr. Peralta instructed him to discharge the crew. When he was recalled as a reply witness in respect of that conversation (which was not mentioned in the complaint), Mr. Peralta adamantly denied having given Mr. Santos any such instruction. Although the matter is not entirely free of doubt, we find it to be more likely than not that Mr. Santos misunderstood what Mr. Peralta said to him during that conversation. In reaching this conclusion, we have taken into account the aforementioned language difficulties which interfered with their ability to effectively communicate with one another. In this regard, we note that immediately following that conversation, Mr. Santos telephoned Mr. Fialho, told him that he had had a conversation with Mr. Peralta, and then said to Mr. Fialho (in Portuguese), "Can you ask him what he said because I didn't understand." (In his testimony before the Board, Mr. Santos stated that he actually had understood what Mr. Peralta had said, and merely wanted Mr. Fialho to telephone him to confirm it. However, we do not find that evidence to be credible.) When Mr. Fialho telephoned Mr. Peralta pursuant to that request, Mr. Peralta said, "He [Mr. Santos] did understand, and I'm not going to tell you because you're a union member." We do, however, accept Mr. Santos' evidence, which was corroborated by Messrs. Fialho, Borda D'Agua, Guardado, and Palhaca, that Mr. Peralta referred to the "Ilda C" as the "union boat" in the weighing room of the Etna plant. This occurred on August 15 or 16, 1986. In this regard, we do not find to be credible Mr. Peralta's testimony that he does not recall ever saying that. Although the use of those words does not, by itself, demonstrate anti-union animus, Mr. Peralta's lack of credibility regarding that and various other matters is a factor to be taken into account in assessing the reliability of his evidence concerning his motivation for the actions (described below) which gave rise to this complaint.

16. One of Ms. Elias' responsibilities is to inform the owners of a licence when a quota on their licence is nearing exhaustion. She generally does this at the point at which there are about 10,000 pounds left on it. The 1,007 pounds of perch caught by the "Ilda C" on 211 on August 18 brought the total poundage of perch caught on that licence in 1986 to 64,853. As noted above, the 1986 perch quota on that licence was 74,157 pounds. On the morning of August 19, Ms. Elias advised Vito Peralta that there was less than 10,000 pounds remaining on that quota. Mr. Peralta appeared to be troubled by that information, and told Ms. Elias that 211 was not supposed to be fished before 342. After Ms. Elias verified that it was 211, Vito Peralta informed Jerry Peralta of the situation and told him that the catch that had been recorded on 211 would have to be transferred to 342. This made Jerry Peralta angry because it meant that the money which had been credited to him (through his fishery) in respect of the sale of the fish caught under the 211 perch quota would have to be repaid to the respondent corporation. He was also concerned that the price of perch might fall, resulting in a reduction of the income yielded by 211. However, he decided "not

to make a big deal about it” because if he had been an owner of the “Ilda C”, he would also have wanted the captain and the crew to fish 342 (i.e., the licence historically fished by that vessel) before fishing another licence. Thus, he acquiesced in the transfer of 56,486 pounds of perch from 211 to 342. (That transfer could not be made without the approval of the MNR. Vito Peralta contacted the local MNR office on August 19 and, following further discussions, obtained MNR approval for the transfer on or about September 3, 1986.)

17. While Vito Peralta and Jerry Peralta were arguing about the situation, Mr. Santos was called to the office. Mr. Fialho accompanied him to serve as an interpreter. As they entered the office they heard Vito Peralta and Jerry Peralta “screaming” at each other. When they asked Ms. Elias what was going on, she said, “Something with the licences. Vito will explain it to you.” A few minutes later Vito Peralta came over to them and told Mr. Santos (through Mr. Fialho) that they had a “big problem” and were going to have to call the MNR because of the way in which Mr. Santos had fished the two licences. When he asked Mr. Santos why he had not fished 342 and then 211, Mr. Santos said that he was unaware that Mr. Peralta had wanted him to fish 342 first, as no one had ever told him that.

18. During the course of his heated discussions with Vito Peralta on August 19, Jerry Peralta indicated that he wanted 211 removed from the “Ilda C” and placed on another boat. His evidence concerning his motivation for making that request is not entirely credible. He initially testified as follows: “I wanted my licence taken off the ‘Ilda C’. The reason for that was his [Mr. Santos’] catches when we found out about the problem were very poor compared to other boats. I wanted my quotas caught.” However, Jerry Peralta’s assertion concerning the relative size of the “Ilda C’s” catches is not borne out by the documentary evidence. Moreover, Jerry Peralta subsequently contradicted that evidence by telling the Board that he was “not that much” concerned about how quickly his quota would be caught, and that “[i]t was more the price of the fish” which was of concern to him, as fish prices sometimes decline later in the season. However, we do not believe that to have been Jerry Peralta’s major concern, as it is clear that if the “Ilda C” had fished 342 first and then 211 as Vito Peralta intended it to, and as Jerry Peralta recognized to be appropriate, the fish would not have been caught under 211 until relatively late in the season in any event. When he was asked if there were “any other reasons” why he wanted 211 removed from the “Ilda C”, Jerry Peralta was unable to recall any. However, in response to leading questions by respondents’ counsel he said that part of the reason was that he was upset by the actions of Mr. Santos.

19. Vito Peralta testified that when Ms. Elias advised him that the perch quota on 211 was almost exhausted, he was “very, very angry” at Mr. Santos. However, he also testified that he did not really want to have 211 taken off the “Ilda C” and would like to have seen it continue to be fished by that boat, but decided to remove it because Jerry Peralta insisted that he do so. He also told the Board that if his brother had accepted 211 remaining on the “Ilda C”, not much disciplinary action would likely have been taken against Mr. Santos, and no disciplinary action would have been taken against the crew.

20. The grievors continued to fish on the “Ilda C” on August 20, 21, and 22. However, after they arrived at the plant on August 22, Messrs. Santos and Fialho were called to the office, where they were given a written direction from Vito Peralta (who was not present at the time) instructing them to “pull all nets and equipment out of the water and arrange to have everything returned to the twine shanty”. (Considerable evidence was adduced concerning whether the document which was given to them at that time was Exhibit 21 or Exhibit 30. The wording of those two documents is substantially similar, but Exhibit 30 is typed in a more professional manner and does not contain the spelling and typographical errors which appear in Exhibit 21. In the circumstances

of this complaint, we find it unnecessary to comment further upon that evidence as, in our view, nothing turns on it.)

21. August 23 was the last day on which the grievors fished on the "Ilda C". After the day's catch had been delivered to the plant, Mr. Santos asked Mr. Fialho to go into the office with him to speak with Vito Peralta. When they went into the office Mr. Fialho asked Mr. Peralta on behalf of Mr. Santos what was going to happen to them and the rest of the crew. Mr. Peralta responded that he was laying them all off and that they would have to wait until September 13, the day on which he anticipated that the pre-hearing vote would be conducted in respect of the Union's application for certification. He also said, "After that, we'll see."

22. On August 27, the grievors went to the dock where the "Ilda C" was berthed. Mr. Santos usually drives Messrs. Palhaca and Fialho and the other members of the crew to the dock in the Company's truck (which is also used to transport fish from the boat to the plant). On the morning of August 27, when Mr. Santos drove up to the residence of Messrs. Palhaca and Fialho, he told them that he was not going to give them a ride that day. Thus, they had to provide their own transportation. Mr. Santos took that action in order to teach them a lesson about the need for co-operation, as they had failed to follow his instructions regarding some containers on the boat. After driving to the dock in Mr. Palhaca's car and assisting the rest of the crew in transporting nets and other equipment from the "Ilda C" to the shanty, Messrs. Palhaca and Fialho went to talk to Vito Peralta (at his greenhouse operation) to express concern about having not been given a ride to work, and to find out if Mr. Santos had been acting pursuant to Mr. Peralta's instructions. Mr. Peralta advised them that he knew nothing about it, and suggested that they raise the matter with Mr. Santos in his presence at the shanty later that day. There is conflicting evidence concerning what transpired later that day when, in accordance with Mr. Peralta's suggestion, they raised the matter with Mr. Santos at the shanty in Mr. Peralta's presence. We do not find it necessary to detail all of the discrepancies in the evidence concerning what occurred at the shanty. It is sufficient to note that we believe neither Mr. Peralta's evidence that Mr. Santos told him at that time that he (Mr. Santos) wanted to discharge Messrs. Palhaca and Fialho for this incident, nor Mr. Santos' testimony that Mr. Peralta told him at that time that if he wanted to discharge Messrs. Palhaca and Fialho, he could do so. Both witnesses appeared to us to be attempting to reconstruct those events in a manner which they perceived to be most likely to advance their strong desire to win this case. Whatever may actually have been said at that time, it is clear from the totality of the evidence that neither Messrs. Palhaca nor Fialho were discharged, although they, Mr. Santos, and the rest of the grievors were laid off that day. In confirming their lay-off, Mr. Peralta reiterated that he would contact them after September 13.

23. The pre-hearing representation vote occurred on September 20 rather than on September 13, as originally contemplated. The ballots were not counted at that time as the ballot box was sealed by direction of the Board (differently constituted). That panel of the Board subsequently ordered that the ballot box be opened and the vote counted (in an unreported decision dated February 24, 1987, in File No. 1292-86-R). In an unreported decision dated April 21, 1987 regarding those proceedings, that panel of the Board wrote, in part, as follows:

5. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant, a result which would not have changed even if the single segregated ballot had been cast against the applicant....

By that decision, the Board certified the Union on an interim basis, pending a final determination of the appropriate bargaining unit.

24. The grievors were not recalled in September after the pre-hearing representation vote,

and had not been recalled as of July 30, 1987, the final day of the hearing of this complaint. The remainder of the (1986) quota on 211 was given to the "F.B. Clay". As indicated above, the "F.B. Clay" is another of the Peralta boats. Its captain is Vito Peralta's brother-in-law, Sam Barocco, who is also one of its part owners. The other persons who have a financial interest in that boat are Vito Peralta, Salvatore Peralta, and Joe Caradonna (the husband of Vito Peralta's sister, Anna). As further indicated above, Vito Peralta was aware at the time of the transfer that the Union was also attempting to organize that boat, but had only succeeded in signing up four of its crew members.

25. During his testimony on March 4, 1987, Vito Peralta told the Board that the "Ilda C" was for sale, and that 342 would likely be sold along with the boat, or "rented" to another boat. He suggested that it was unlikely that the Company would fish the "Ilda C" in 1987, as it had consistently lost money for four years and had no money for "start up". He also testified that "Etna Foods is at the point of not wanting to continue to support it." It was also his evidence that if the "Ilda C" did "start up", it would probably go out with a smaller crew. He further testified that he would replace the captain because he would not trust Mr. Santos with his boat again. As of July 30, 1987, the "Ilda C" had not fished at all during the 1987 fishing season.

26. As indicated earlier in this decision, one of the provisions of the Act which the complainant alleges to have been contravened is section 79. When it received notice from the Board of the Union's application for certification in early August of 1986, the Company, by virtue of section 79(2) of the Act, became legally obligated to refrain from altering terms and conditions of employment, and any rights or privileges of the employees, without the consent of the Union. The obligation imposed by that provision has frequently been described in the Board's jurisprudence as a requirement to carry on "business as before": see, for example, *K-Mart Canada Limited*, [1982] OLRB Rep. Jan. 64, and *A E S Data Limited*, [1979] OLRB Rep. May 368. In its frequently cited decision in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, at paragraph 23, the Board wrote, in part, as follows:

The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

More recently, the Board has found it appropriate to consider the reasonable expectations of employees in determining rights and privileges which are frozen by section 79: see, for example, *W.H. Smith Canada Limited* [1986] OLRB Rep. June 920; *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453; *Simpsons Limited*, [1985] OLRB Apr. 594; and *Simpsons Limited*, [1985] OLRB Rep. Mar. 469. A finding of anti-union motivation is not essential in the context of section 79, as it is a strict liability provision.

27. The arrangements to which Mr. Peralta and Mr. Santos agreed for the 1986 fishing season are described above in paragraph 8 of this decision. Those arrangements were not expressly or implicitly conditional upon the grievors fishing 342 first and then 211. Indeed, Mr. Santos and the other grievors were unaware of any such requirement at all material times. Vito Peralta caused the respondent corporation to substantially alter those terms and conditions of employment by remov-

ing 342 and 211 from the "Ilda C", denying the grievors access to AY265, laying off the grievors at the onset of the height of the fishing season, and failing to pay Mr. Santos his captain's bonus. Those actions were a dramatic departure from "business as before", and were utterly inconsistent with the reasonable expectations of the grievors. The Union did not consent to any of those changes. Thus, we find that the Company contravened section 79(2) of the Act by altering the grievors' terms and conditions of employment in the manner described above.

28. The complainant has also alleged that the respondents contravened section 66 of the Act. As noted by the Board in *K & U Manufacturing Limited*, [1986] OLRB Rep. Jan. 115, at paragraph 43:

It is well-established in the Board's jurisprudence that a discharge or layoff will constitute an unfair labour practice if it is motivated in whole or in part by anti-union considerations. See, for example, *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, in which the Board wrote, in part, as follows (at paragraph 4):

....Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive....

(See also *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449; *Starplex Scientific Division of Canadian Medical Laboratories Limited*, [1981] OLRB Rep. March 346; *Knud Simonsen Industries Limited*, [1980] OLRB Rep. Oct. 1466; *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645.); and *Tillotson-Sekisui Plastics Limited*, [1979] OLRB Rep. Oct. 1027.)

The nature of the determination to be made in cases such as the instant case, and some of the factors to be considered by the Board, were described as follows in the *Pop Shoppe* case, *supra*, at paragraph 5:

In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC ¶16,278)....

See also *Honest Ed's Limited*, [1985] OLRB Rep. Nov. 1609; *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449; and the numerous decisions cited therein.

29. Having carefully considered all of the evidence and the submissions of the parties, we have concluded that the respondents contravened section 66 of the Act by removing 211 and 342 from the "Ilda C", denying the grievors an opportunity to fish AY265, laying off the grievors on August 27, 1987, and failing to pay Mr. Santos his captain's bonus. Vito Peralta told the Board that the lay-offs were necessitated by Jerry Peralta's "insistence" that 211 be taken off the "Ilda C". However, as indicated above, Jerry Peralta had only a one-third interest in 211. Thus, he was not in a position to force Vito Peralta to remove 211 from the "Ilda C". As further indicated above, the reasons which Jerry Peralta gave for wanting to have 211 removed from the "Ilda C" do not bear up under scrutiny. Moreover, it is clear that Vito Peralta had been entrusted by Jerry Peralta and Salvatore Peralta with the ultimate decision-making power concerning the use of 211. We have concluded from the totality of the evidence that if the grievors had not joined the Union, Vito Peralta would not have honoured his brother's request that 211 be removed from the "Ilda C". It is apparent that the decision was not economically sound. The grievors were laid off near the beginning of the most productive part of the fishing season. "Start-up", insurance, and other costs associated with operating the "Ilda C" during the 1986 fishing season had already been incurred. More-

over, the documentation prepared by Ms. Elias indicates that the “Ilda C” was one of the most productive boats of those which supplied Etna by fishing (in whole or in part) in Kent County waters. Under the circumstances, we find that honouring Jerry Peralta’s request was merely a guise which Vito Peralta has attempted to use to mask the anti-union considerations which actually motivated the grievors’ lay-off. We are confirmed in that view by the timing of the layoffs. As indicated earlier in this decision, we are satisfied on the totality of the evidence that by August 14, if not before, Vito Peralta was aware that the “Ilda C” had been catching perch primarily under licence 211 rather than 342. However, he did not consider that to be a matter of importance until later that month, after he became aware that all seven of the grievors had joined the Union. Mr. Peralta also offered no credible explanation for failing to permit the grievors to complete the various unfinished quotas that were available under 342, or to give the grievors an opportunity to fish the largely untouched quotas available under licence AY265. Therefore, having regard to the totality of the evidence, we find that in removing 211 and 342 from the “Ilda C”, denying the grievors an opportunity to fish AY265, laying off the grievors on August 27, 1987, and failing to pay Mr. Santos his captain’s bonus, the respondents were motivated at least in part by a desire to punish the grievors for having joined the Union. Accordingly, we find that the respondent corporation, and the respondent Vito Peralta, as a person acting on behalf of the respondent corporation, contravened section 66 of the Act, as alleged by the complainant.

30. We are also satisfied on the totality of the evidence that by removing 342 and 211 from the “Ilda C”, denying the grievors access to AY265, laying off all of the grievors at the onset of the height of the fishing season, and failing to pay the captain’s bonus, the respondents contravened section 70 of the Act. By means of those intimidatory and coercive actions, the respondents sought to compel the grievors to cease to be members of the Union, and to refrain from voting in favour of certification of the Union.

31. In addressing the matter of remedy, complainant’s counsel asked the Board to reinstate the grievors with compensation for their losses. As an alternative, he requested that the Board award the grievors full compensation for the 1986 and 1987 fishing seasons. Counsel for the respondents submitted that, in the event the complaint succeeded, the only appropriate remedy would be a compensation order. In support of that position he referred the Board to *Academy of Medicine*, [1977] OLRB Rep. Dec. 783. He also noted in that regard that the fishing licences are not the property of the Company, as they belong to various individuals, including persons who are not parties to these proceedings. Thus, he submitted that the Board cannot direct that any of those licences be placed aboard the “Ilda C”, as to do so would be to directly affect the rights of individuals who are not respondents in these proceedings.

32. As submitted by respondents’ counsel, the Board has recognized that there are some practical limits on its remedial jurisdiction. In the *Academy of Medicine* case, *supra*, the Board found that an employer had contravened what are now sections 64, 66, and 70 of the Act by closing its Call Answering Division to eliminate a union, retaliate against employees in that division for their selection and support of the union, and discourage unionization in other divisions. In rejecting the union’s request for an order requiring the employer to re-open its Call Answering Division, the Board wrote, in part, as follows:

43. While section 79 [now 89] contemplates that the Board will develop and apply new remedies, where appropriate, the Board’s creative function must be carried out within the practical, as well as the statutory, limits of its remedial jurisdiction. An overreaching of these limits in a particular case may result in a general weakening in the efficacy of the Board’s remedial orders, which depend to a very large extent upon voluntary compliance. The language of section 79 may be wide enough to permit an order requiring the respondent to re-open. The Board has concluded, however, that an order for re-opening would not be an appropriate exercise of its remedial authority. A mandatory order compelling an employer to operate a service which it does not

wish to operate, albeit for a prohibited reason, would give rise to obvious difficulties of enforcement - difficulties which, in the long run, could only serve to weaken the efficacy of the Board's remedial orders.

44. The impracticality of an order for reopening no doubt explains the absence of any precedent for such relief either in the United States or Canada. While there have been cases involving unfair labour practice closures in other jurisdictions, in none of those cases has the employer been ordered to reinstitute an operation which has been wholly and permanently discontinued. *Serv-U Stores, Inc.*, (1976) 93 LRRM, 1033, *Plastic Transport Inc.*, (1971) 78 LRRM, 1185, and *George Lithograph Co.*, (1973) 83 LRRM, 1402, the authorities referred to by counsel, all involved situations where the work performed by the discontinued operation was continued in some other part of the employer's enterprise. That was essentially the situation in *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. 401, a recent decision of this Board involving a run-away shop.

45. To conclude that the Board will not require an employer that has shut down in violation of The Labour Relations Act to re-open is not, however, to conclude that an unlawful closure should be without a remedy. While there are, as this case illustrates, limits to the capacity of the Board to deal effectively with those who would so fundamentally contravene the Act, it can at least ensure that those injured by such unlawful conduct are compensated in damages. An award of damages in this case would serve the additional function of providing some disincentive for similar conduct in the future and, in this way, help to support the public interest in encouraging the practice and procedure of collective bargaining.

33. In addition to those considerations, in the instant case there are also other factors which militate against an order that the Company resume its fishery operations and reinstate the grievors. As indicated above, the Company has been unprofitable since its inception and would have to go even further into debt in order to obtain "start up" funds. The "Ilda C" has been put up for sale and may have been sold by the time this decision issues. Moreover, the Company does not own any fishing licences and may not be able to "rent" any with unused quotas in respect of the 1987 fishing season at this point in time, with most of the 1987 fishing season past. Having regard to all of those circumstances, as well as to the practical considerations described in the *Academy of Medicine* case, we have concluded that an order directing the Company to reinstate the grievors would be inappropriate. A compensation order, on the other hand, is clearly warranted. However, we have concluded that compensation should be confined to losses incurred by the grievors in respect of the 1986 fishing season. On the basis of the circumstances described above, we have concluded that it is far from certain that the "Ilda C" would have fished during the 1987 fishing season even if the grievors had not joined the Union. Moreover, it is clear from the evidence adduced before us that captains and crew members often leave one boat at the end of a fishing season and go to work on another boat during the next fishing season. Thus, it is questionable whether the grievors would have worked for the Company during 1987 in any event.

34. The compensation payable to the grievors in respect of the respondent's unfair labour practices is to be calculated on the basis of the monies which would have been received by the grievors if they had been permitted to continue fishing on the "Ilda C" throughout the 1986 fishing season, including the monies which they would have received if they had been permitted to exhaust all of the quotas on 211, 342, and AY265. It is also to include the packing fees which would have been paid in respect of that fish, and the aforementioned five per cent captain's bonus.

35. Interest is also to be paid by the respondents on the compensation awarded by this decision. That interest is to be calculated in the manner described in Practice Note 13, dated September 8, 1980, for the accrual period from August 27, 1986 to the end of the 1986 fishing season. However, in calculating the interest payable in respect of the period from the end of the 1986 fishing season to the date on which the compensation is paid to the grievors, the approach set forth in that Practice Note is to be varied by eliminating the second step (i.e., division in half), to reflect

the fact that as of the end of the season, the period of accrual would have terminated and the grievors would have had the benefit of the entire amount of compensation as of that time. Division in half is also inappropriate in calculating interest payable on the captain's bonus, as that bonus would have been paid in a lump sum at the end of the fishing season, but for the respondents' contraventions of the Act.

36. As noted above, it was (and is) the Company's position in the aforementioned certification proceedings that Mr. Santos should be excluded from the bargaining unit on the ground that he (allegedly) exercises managerial functions. That matter is one of the issues remaining to be determined in those proceedings. However, it was not suggested by respondents' counsel in the instant case that the complainant Union was in any way precluded from obtaining a remedy in respect of Mr. Santos by virtue of the functions which he performed as captain of the "Ilda C". Moreover, the limited evidence which was adduced before us concerning his duties and responsibilities does not warrant a finding in the instant case that he is not an "employee" within the meaning of the *Labour Relations Act*. Accordingly, we have dealt with this complaint without distinguishing Mr. Santos from any of the other grievors in respect of their employment status with the Company.

37. As indicated above, the respondent Vito Peralta is the President of the corporate respondent, which is owned by himself and his retired father. As further indicated above, Vito Peralta, who is the person who directs, manages, and controls the Company's operations, has personally contravened sections 66 and 70 of the Act. Under the circumstances, we find it appropriate to make an order against both the Company and Vito Peralta personally (see, generally, *Walter Tool and Die Ltd.*, [1986] OLRB Rep. Aug. 1167; *Heritage Manner Rest Homes*, [1983] OLRB Rep. Mar. 385; and *Sunnylea Foods Limited*, [1981] OLRB Rep. Nov. 1640).

38. For the foregoing reasons, the Board hereby declares that the respondents have contravened sections 66 and 70 of the *Labour Relations Act*, and that the corporate respondent has also contravened section 79(2) of the Act. To remedy those contraventions, the Board, pursuant to section 89(4) of the Act, hereby directs that the respondents:

(1) compensate the grievors for all losses incurred by them in respect of the 1986 fishing season as a result of the aforementioned unfair labour practices, such losses to be calculated in accordance with paragraph 34 of this decision; and

(2) pay interest on the compensation ordered by the Board, such interest to be calculated in accordance with paragraph 35 of this decision.

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**2724-86-M United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, Applicant v. Sutherland and Shultz Limited, Respondent**

**Construction Industry Grievance - Applicant union grieving that a member of another local was employed without having a referral slip - Employer seeking to rely on the provisions of the union's constitution governing members' use of travel cards - Union constitution cannot confer any rights on the employer nor can its mere existence give rise to an estoppel - Employer found to have violated collective agreement**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

**APPEARANCES:** *P. Timmins*, *B. Christie* for the applicant; *T. J. Billo*, *B. J. Houston*, *J. D. Dougall* for the respondent.

**DECISION OF THE BOARD; September 11, 1987**

1. In December of 1986, Sutherland and Shultz Limited was awarded a contract to perform certain work ("the job") at the General Motors chassis plant in the City of Oshawa. It sent Jim Scharlach to perform work in connection with that contract on December 28, 29 and 30, 1986. Sutherland and Schultz Limited is one of the employers bound by the provincial collective agreement between the Mechanical Contractor's Association, Ontario and The Ontario Pipetrades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. It is common ground that Mr. Scharlach performed work which falls within the scope of that collective agreement during the three day period in question. Mr. Scharlach is a member of Local 527 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the UA"). The applicant, Local 463 of the UA, is the UA local with geographic jurisdiction in the City of Oshawa. Mr. Scharlach left a valid travel card at the offices of Local 463 before he went to the jobsite, but did not receive a referral slip. Local 463 grieves that the respondent violated the provincial collective agreement by permitting Mr. Scharlach to perform bargaining unit work during the period in question and has referred that grievance to this Board for arbitration pursuant to section 124 of the *Labour Relations Act*. The parties agree that if we find that the respondent did breach the collective agreement, the amount of compensation to which Local 463 may be entitled as a result, if any, is to be determined at a subsequent hearing unless the parties are able to resolve that question themselves.

2. The respondent and Local 463 started discussing the job in question in mid-December. It was the subject of a pre-job conference on December 22, 1986, at which a dispute arose about whether certain of the work involved should be awarded to plumbers or to another trade. Local 463 was given until noon on December 24th to provide the respondent with information and evidence in support of its jurisdictional claim over that work. Its business manager and business representatives were in the course of gathering up that material when Mr. Scharlach attended on them in Local 463's offices in the afternoon of December 23rd.

3. Mr. Scharlach spoke to Brian Christie, a business agent for Local 463, on December 23, 1986. He had earlier spoken by telephone to Mr. Christie of his desire to deposit his travel card and obtain a referral to the job as foreman and to request, on behalf of Sutherland and Schultz, that the union refer two Local 463 members to the job. That is what he discussed with Mr. Christie

again on the afternoon of December 23rd. Mr. Christie told him of the jurisdictional dispute. He said that if Local 463 got the disputed work, it would refer him as a foreman; if not, it would insist on sending one of its own members as foreman. With respect to Mr. Scharlach's travel card, Mr. Christie suggested that the union would hold it for him but not treat it as having been formally deposited until the decision whether to refer him was made, as formal deposit of the card would require a payment from him. There was some discussion about how referral arrangements could be made during the Christmas holiday period. Mr. Christie gave Mr. Scharlach his home telephone number and the home telephone number of the business manager, and assured him that one or other of them could be in the union office on very short notice to make any required referrals. It is Mr. Christie's evidence that Mr. Scharlach did not ask for a referral slip at this time. Mr. Scharlach did not testify.

4. On December 28, 1986, Mr. Scharlach went to work for the respondent at the General Motors chassis plant job. He did not have a referral slip. The union learned of this a day or two later, and protested in a telegram to the respondent. The respondent's Vice-President of Construction, Bernard Houston, then telephoned Bob Watson, a UA International representative, to discuss the matter. Mr. Houston asserted his understanding that the respondent was entitled to send one man to a job on a travel card. According to Mr. Houston, Mr. Watson confirmed his understanding and said he would deal with the matter. Mr. Watson did not testify.

5. The conversation between Messrs. Houston and Watson took place on December 30, 1986. Mr. Watson telephoned Mr. Houston on January 2, 1987, and told him that Chris Burrows, the business manager for Local 463, was not happy with Mr. Watson's having interfered in the matter. Mr. Watson asked Mr. Houston to straighten the matter out directly with Mr. Burrows. Messrs. Houston and Burrows then had a conversation or conversations, as a result of which it was agreed that, from and after January 2, 1987, Mr. Scharlach would not work with the tools on this job and that Local 463 would refer the men necessary to do the work, including someone to act as foreman. While the respondent seems to have thought that this was the end of the matter, we are not persuaded that those or subsequent discussions between the applicant and respondent resulted in any settlement of the union's grievance or potential grievance with respect to the employment of Mr. Scharlach on December 28, 29 and 30, 1986.

6. The parties agree that the provincial collective agreement by which they were bound at the time of the alleged breach included the following provisions:

#### ARTICLE 1 - DEFINITIONS

- 1.4 "Union" means a local union having geographical jurisdiction over a particular area and any successor or assign.
- 1.6 "Member" means any member of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.
- 1.8 "Employee" means a qualified and/or Certified Journeyman or Apprentice employed by a Contractor as a plumber, steamfitter, pipefitter, welder, and apprentice thereof, or job foreman.

#### ARTICLE 12 - UNION SECURITY

- 12.1 As a condition of employment, an employee must be in good standing with the Union.

## APPENDIX 12W

## ZONE 12W OSHAWA - PETERBOROUGH - LOCAL UNION 463

## ARTICLE 101 HIRING

- 101.1 The Contractor agrees to give preference in employment to Members of the Union having Jurisdiction over the area where the work is being performed. Such Member shall have his Certificate of Qualification for the trade required, the tools listed in Article 106 hereof, and shall present the Contractor and Job Steward if applicable with a work referral slip issued to him by the Union, before starting work, or the Union shall have the right to remove said man from the project.
- 101.3 A Contractor who after (3) three regular working days of a request to the Union (Saturday, Sunday and Holidays excluded) does not obtain the number of qualified Members requested, shall notify the Business Manager of the Local Union by wire, that the Contractor will obtain Members from other U.A. sources if available.

. . .

## ARTICLE 111 FOREMEN

- 111.1 Job Foremen [sic] shall mean: a qualified Journeyman who is elevated by his employer to lay-out work and who shall within the terms of this Agreement instruct other Members of his respective trade.
- 111.2 The Contract shall appoint or demote a Foreman to Journeyman or appoint or demote additional Foremen, at his discretion as may be required. Any project requiring more than (3) three foremen, an area foreman shall be at the ratio of (4) four to (1) one.
- 111.3 He shall protect and promote the interests of the Contractor on the job or in the shop at all times, within the terms of this Agreement.
- 111.4 The extent to which a Foreman shall work with the tools of the trade shall be at the discretion of the Contractor or his representative.

7. Article 101 clearly requires the exclusive use of members of Local 463 on jobs in the geographic area over which that local has jurisdiction, unless Local 463 proves unable to supply the necessary workers. As between an employer and the local union, this is a requirement which the local union can waive on a case by case basis as it sees fit. The issuance of a referral slip to a worker who is not a member of its local is apparently the way this local customarily signifies its consent to employment of that worker notwithstanding the requirements of Article 101. While it is true, as counsel for the respondent argued, that Article 101 does not expressly require that any worker other than a member of Local 463 present a referral slip, the union's grievance that a member of another local was employed without having a referral slip is simply another way of saying that the respondent's employment of a member of another local in a bargaining unit position on this job was a breach of Article 101 which Local 463 had not waived.

8. Counsel for the respondent argues that Article 111 overrides Article 101 and gives an employer the right to employ any journeyman it wishes as a job foreman, whether or not that journeyman is a member of the union having jurisdiction over the area where the work is being performed. The language of Article 111, and particularly the use of the phrases "elevated by his employer" and "appoint or demote", is more consistent with the applicant's interpretation, which is that the only right given by Article 111 is the right to select a foreman from among those journeymen whose employment on the job is otherwise permissible under the terms of the collective agreement.

9. The respondent employer seeks to rely on the provisions of the UA constitution governing members' use of the travel cards and the rights associated with travel cards and, particularly, the following provision:

A travel card shall be accepted under the provisions of this section for one Building Trades journeyman member for each branch of the craft, that is, one plumber, one steamfitter or pipe fitter, one lead burner, and one sprinkler fitter sent from one Local Union to perform or install work in the jurisdiction of another Local Union for a contractor in agreement with the home Local Union, ordinarily engaged in work elsewhere. Such journeymen although performing supervisory work, may also work with the tools, and shall not, in any event, be subject to an examination.

The respondent says that this is what gives it the ability to put a member of one local to work on a job in the geographic jurisdiction of another local, so as then to be in a position to appoint him to the position of job foreman pursuant to Article 111.

10. The UA constitution is a contract between each member of the union and all of the other members governing the relationship between and among members, local unions and the international union. Only parties to that contract - the members - have rights or obligations thereunder. Even assuming that the provision referred to by the respondent employer confers the right contended for on a member in the position of Mr. Scharlach, it cannot confer any right on the respondent. The respondent argues, however, that this provision of the UA constitution estops the local union from relying on Article 101 to prevent the respondent from employing a single member of another UA local on a project in Local 463's geographic jurisdiction. As the cases referred to by counsel for the respondent indicate, an estoppel arises when one party to a collective agreement has represented to the other, by words or conduct, that it will not strictly enforce its legal rights under the collective agreement, and the other - the party later asserting the estoppel - has relied on that representation in such a way that it would be detrimentally affected if the legal right in question were to be strictly enforced against it: *The Master Insulators' Association of Ontario, Incorporated* [1979] OLRB Rep. Sept. 877; *Comstock International Ltd.*, [1982] OLRB Rep. June 852; *Vanbots Construction*, [1982] OLRB Rep. July 1086; *New Vision Construction Limited*, [1983] OLRB Rep. Mar. 428; *Losereit Sales and Services Ltd.*, [1983] OLRB Rep. April 569.

11. The mere existence of the union's constitution is not a representation to employers of the sort which can give rise to an estoppel. There is no suggestion that the employee bargaining agency in provincial bargaining has ever told the employer bargaining agency that the UA constitution effectively gives employers the right contended for by the respondent. It is noteworthy that the right to transfer employees who are members of one local to jobs in an area over which another local has jurisdiction has been specifically addressed in the provincial agreement in Appendices applicable to other areas. Article 111.3 of the Appendix covering Local 527's area, for example, expressly provides that "Contractors from outside the Union's jurisdictional area shall be allowed to bring in one (1) foreman for the project."

12. The respondent's witnesses made reference to two jobs previously performed by the respondent in Local 463's geographic area in which the respondent was permitted to employ one or more persons who were members of other locals. In light of Mr. Burrows' uncontradicted evidence about the circumstances in which that occurred on those two occasions, and his evidence about the circumstances of two other projects performed by the respondent in Local 463's geographic area, we conclude that past practice is quite consistent with the union's position that employment of members of other locals in bargaining unit positions including "foreman" (as opposed to non-working supervisory positions) is a matter it discusses and considers on a project by project basis and is generally not consented to if Local 463 has unemployed members qualified to perform the work in question. Local 463's past dealings with the respondent do not amount to a representation

by conduct that the respondent will always be permitted to employ one travel card member on each job in Local 463's geographic area.

13. Mr. Watson did make a representation to Mr. Houston on December 30, 1986, which was consistent with the respondent's belief that it could employ one travel card member at a job in Local 463's geographic area. While denying that Mr. Watson had actual authority to make that representation on behalf of Local 463, counsel for the local union concedes that, vis a vis the respondent, Mr. Watson would have had ostensible authority to make a representation of that kind. That representation is not something on which the respondent could be said to have relied at any time before the representation was made. Accordingly, it can only serve as a defence with respect to that portion of Local 463's claim which relates to the period of time (if any) on December 30, 1986, after the conversation between Watson and Houston during which Mr. Scharlach continued to work.

14. Accordingly, we find that the respondent violated the collective agreement by employing Mr. Scharlach as an "employee" within the meaning of that collective agreement on a project in Local 463's geographic area without the consent of Local 463 during the period from the point in time at which Mr. Scharlach started work on December 28, 1986 to the earlier of the completion of his work on December 30, 1986 and the telephone conversation that day between Messrs. Houston and Watson. We direct that the respondent compensate the applicant for the losses (if any) which it and its then unemployed members (if any) may have suffered as a result of this breach. We remain seized with this referral for the purpose of resolving any dispute over the quantum of compensation awarded if the parties are unable to resolve that issue themselves.

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**1445-85-U** United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. Labourers' International Union of North America, Local 183, Respondent v. **Toronto Housing Labour Bureau** and Bramalea Limited, Intervener #1 v. Presidential Group Limited and Presidential Group (Brookshire) Limited, Intervener #2

**Construction Industry - Practice and Procedure - Unfair Labour Practice - Unfair labour practice complaint relating to carpentry framework within the residential sector - Complaint dismissed for delay and abuse of process**

**BEFORE:** *Thomas S. Kuttner*, Vice-Chair, and Board Members *W. H. Wightman* and *W. F. Ruth-erford*.

**APPEARANCES:** *Harold F. Caley*, *David A. McKee* and *Tony Ianuzzi* for the complainant; *C. M. Mitchell* for the respondent; *G. Grossman* and *G. Lavis* for the Toronto Housing Labour Bureau; *M. Patrick Moran* and *Stephen Hall* for Bramalea Limited; *Paul Young* and *Marty Schmerz* for intervener #2; *Richard J. Charney* and *Karl Mallette* for the Metropolitan Toronto Apartment Builders Association.

**DECISION OF THE BOARD;** September 14, 1987

1. Ought the Board to entertain a section 89 complaint, the substance of which is already

the subject of complaint proceedings pending before it - and one moreover, arising from facts and circumstances long known to the complainant but concerning which it has chosen not to press for remedy? That is the issue before us for determination. It calls for consideration of principles fundamental in our law, ancient and venerable of lineage: *nemo debet bis vexari pro una et eadem causa* - "no man ought to be twice troubled or harassed for one and the same cause"; *interest reipublicae ut sit finis litium* - "it is in the public interest that there be an end to law suits".

2. The principal matter is comprised of a complaint filed pursuant to section 89 of the *Labour Relations Act* in which the complainant, United Brotherhood of Carpenters and Joiners of America, Local 27 ("Local 27") alleges breaches of sections 3, 64, 67(2) and 72 of the Act by the respondent, Labourers' International Union of North America, Local 183 ("Local 183"). The issue here dealt with arises by way of preliminary motion first made by Mr. Mitchell on behalf of Local 183, and echoed unanimously by the several interveners, that the Board dismiss this complaint summarily without further proceeding. The parties have earlier been advised by the Registrar that we are of the view that this motion must be sustained, and this for reasons that here follow.

3. The issue, although a straightforward one, arises out of circumstances of some complexity and in the context of a lengthy series of interrelated applications, complaints, counter-applications and counter-complaints, charges and counter-charges filed over a period of many years by the two principal parties to the instant proceedings and in which recourse to the many remedial provisions of the Act has been had - section 1(4), section 89, section 91 and section 124. Since 1981, the parties have been involved in a bitter dispute, each seeking to assert hegemony over the work of framing carpentry in the residential housing sector of the construction industry. It is a dispute at its root representational in nature as each has sought to gain exclusive bargaining rights for the employees of the many building contractors engaged in residential framing work - a sector largely unorganized prior to this decade. It is a dispute characterized by great acrimony and recrimination. It is a dispute many of the battles of which have been, are in the process of being, or will in the future be, fought in hearing rooms before this Board. It is a dispute characterized by two recurring themes: a relentless attack by Local 183 on bargaining rights earlier asserted by Local 27, or its predecessor United Brotherhood of Carpenters and Joiners of America Local 1190 ("Local 1190"); and a bitter counterattack by Local 27 of the linchpin of Local 183's drive to dominate residential framing - the subcontracting clause it has successfully negotiated with employers, builders, developers and owners, the effect of which has been to squeeze out of framing work those contractors whose employees are represented by Local 27.

4. The saga begins in the summer of 1981 with the filing of a great number of competing applications for certification by both locals seeking bargaining rights for the employees of a variety of contractors engaged in framing carpentry within the residential sector. These various applications were consolidated and put down to be heard together in a single proceeding which, by convention before us, the parties have referred to as the Montemar certification proceedings. Hearings were extremely drawn out and extended from the summer of 1981 to that of 1983 at which time Local 1190 withdrew, both as applicant in their own applications for certification and as intervener in those filed by Local 183. But much had occurred in the interim. The Montemar certification proceedings were dominated by a host of allegations made by Local 183 of misconduct on the part of both the respondent employers and Local 1190 whether as applicant or as intervener. These reached their apogee with the filing in May 1983 of a section 89 complaint of unfair labour practice filed by Local 183 against Local 1190 and sundry other parties (Board File 0320-83-U) alleging breaches of sections 13, 48 and 64 of the Act, the particulars of which were drawn from evidence adduced in the Montemar certification proceedings. In addition, Local 183 sought the rescission and revocation by the Board of all certificates granted to Local 1190 within the residential sector of the housing industry from June 1981 to that date. Some 70 certificates were so impugned.

5. Faced with that onslaught, Local 1190 was quick to retaliate, and on June 15, 1983 filed its counter-complaint under section 89 of the Act against Local 183 and the employers and employer associations with which it had a bargaining relationship governing framing carpentry within the residential sector, asserting breach of sections 48, 64, 66, 67 and 70 of the Act (Board File 0554-83-U). Now, although it was there alleged that Local 183 had, in certain circumstances, entered into collective agreements without first establishing as a foundation, bargaining rights for the employees affected as required by the Act, such allegation was desultory at best. (In any event this was an allegation which would have been answered by the Board's holding of the pre-hire agreement as legitimate in *Nicolls-Radke and Associates Limited*, [1982] OLRB Rep. July 1028 and that line of cases.) The focal point of Local 1190's complaint was something quite different - namely, the subcontracting clause found as a principal feature in each of the collective agreements which Local 183 had entered into with the various employers and employer organizations engaged in carpentry framing work within the residential sector, the effect of which was to limit such work to those contractors having a bargaining relationship with Local 183. The relief sought was that the collective agreements referred to be declared null and void or, alternatively, that the subcontracting clauses therein contained be so declared and so to be of no force and effect. Thus, in response to the attack on the integrity of its bargaining relationships premised on a failure on its part to hold bargaining rights for the employees of those employers with whom it claimed a bargaining relationship, Local 1190 likewise attacked the integrity of the bargaining rights asserted by Local 183, but by impugning the validity of the subcontracting clauses through which it had aggrandized for itself an ever-expanding share of framing carpentry work in the residential sector.

6. Meanwhile, hearings in the Montemar certificate proceedings were ongoing before a panel chaired by Vice-Chair Furness and these were scheduled for continuation on June 23, 1983. Counsel for Local 183 had sought the consolidation of its section 89 complaint (Board File 0320-84-U) with those proceedings and although the Board has acceded to that request, it was determined on that date to consider the two matters *seriatim* particularly in light of the fact that the section 89 complaint had only been filed well after the certification proceedings had been underway. A further complication was the ongoing strike called by Local 1190 against the contractors for those employees it held bargaining rights, a strike which Local 183 asserted was called in collusion with those contractors in order to undermine its organizational drive within the sector. In point of fact, the certification proceedings, which it had been thought would extend well into 1984, were unexpectedly brought to a close by the earlier noted withdrawal by Local 1190 in November 1983 of its own applications for certification and its interventions in those of Local 183. That turn of events resulted in the grant of further certificates to Local 183 with respect to a large number of contractors. The Furness panel never did commence hearings in the section 89 complaint filed by Local 183 because of an accommodation reached between it and Local 1190 and to which we now turn.

7. Hearings in Local 1190's section 89 complaint against Local 183 (Board File 0554-83-U) were scheduled to commence in early June 1983 before a panel of the Board chaired by Vice-Chair Burkett. In a preliminary ruling later reduced to writing (unreported, July 11, 1983) that panel of the Board rejected the preliminary motion made by Local 183 that the complaint be dismissed for failure to make out a *prima facie* case. That ruling was in the following terms:

#### Oral Ruling

We are not prepared to dismiss this complaint, which alleges in part that the no employer support provisions of section 48 of the Act have been breached and further, that the entering into of the subcontracting clause at issue was designed to interfere with the organizing, certification and collective bargaining of the complainant trade union, on the grounds that there is no *prima*

*facie* complaint made out. Where it is alleged, as in this case, that the respondent Labourers' International Union of North America, Local 183, as bargaining agent for a number of residential home builders (who do not directly employ carpenters) has entered into a collective agreement with the builders that provide a preference in the subcontracting of carpentry work to carpenter contractors who are in contractual relations with the Labourers' Union, at a time when there is ongoing competition between the Labourers' Union and the Carpenters' Union in respect of the bargaining rights of carpenters and carpenters' apprentices employed in residential home building by these carpenter contractors, we are not prepared to find that there is no *prima facie* case made out.

This matter will be decided by the Board after the parties have called their evidence and the Board has the benefit of full argument. Having said this we acknowledge that on its face, other than for the fact that the union on whose behalf the subcontracting clause operated in *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022 case had a craft claim to the work, this complaint is difficult to distinguish from *The Metropolitan Toronto Apartment Builders Association* case *supra* and therefore, in the end the Board may be called upon to either reaffirm, modify or overrule it.

We are satisfied that the complainant, as a union with craft jurisdiction over carpentry work, as a union attempting to organize carpenters of carpentry contractors operating in the residential home building sector, and as a union holding bargaining rights in respect of the carpenters employed by a large number of such contractors has status to bring this complaint.

Given the surrounding circumstances we are not prepared to find that the complaint, or any part of it is untimely and, therefore, should not be heard. However, the delay in responding to the events complained of in paragraphs 1, 2 and 3 of Schedule B may affect remedy.

This is a matter in which the complainant will proceed first. The Board will entertain submissions at the conclusion of the case as to where the legal burden falls.

8. It is worthy of note that among those on whose behalf appearances as named respondents were entered in those proceedings were several of the interveners to the instant proceedings including Bramalea Limited, the Toronto Housing Labour Bureau, and the Metropolitan Toronto Apartment Builders Association (which has since withdrawn here). The proceedings proper commenced with the calling by Local 1190 of its principal witness, Mr. Weller, who testified, *inter alia*, to the extent of the bargaining rights held by Local 1190 in the residential home building sector. It is to be recalled that Local 183 had earlier in the Montemar certification proceedings and in its own section 89 complaint, already filed but not yet heard, sought to attack the validity of those bargaining rights. In the section 89 complaint proceedings before the Burkett panel, Local 183 continued with that offensive, but now raising the same issue as a defence to the allegations made against it. The Burkett panel ruled that such was a valid defence and could be pursued by way of cross-examination of Mr. Weller. However, Local 183 could do so effectively only on observance by Mr. Weller of the provisions of a subpoena *duces tecum* which Local 183 had only succeeded in serving on him on the date set for its cross-examination of the witness. Compliance with the ruling of the

Board to that effect, reached only after lengthy wrangling between the parties, could only be obtained by the grant of an adjournment, and such was given.

9. The case was scheduled for further hearing in mid-November, 1983 but those continuation proceedings never took place. It is to be recalled that at that time Local 1190 withdrew from the Montemar certification proceedings, and fast on the heels of that development, the two locals reached an accommodation regarding the respective section 89 proceedings each had filed against the other. By letters dated November 15, 1983 counsel for each advised the Board of their agreement to adjourn Board Files 0320-83-U and 0554-83-U *sine die*. The Board, in accordance with its normal practice granted the adjournments sought on November 18, 1983 on the following terms:

Having regard to the agreement of the parties, the Board hereby consents to adjourn this complaint *sine die*, for a period not exceeding one year. Unless within that time, the parties request that the Board proceed with the matter, it will be terminated.

Insofar as File 0554-83-U was concerned, there matters lay dormant for close to a year, when, on November 8, 1984 Local 1190 requested, by letter addressed to the Registrar of the Board that there be a resumption of hearings in its section 89 complaint. That request was never acknowledged by the Board, nor did it list the matter for continuation of hearing. We return to that complaint later in this recitation of events.

10. Now, although there was a moratorium on the section 89 complaint front, no general cease fire had been declared in the war for ascendancy in carpentry framework within the residential sector, and indeed the struggle went on unabated. The terrain however changed, as the parties moved from the simple filing of complaints under section 89 of the Act to a more varied strategy, with Local 183 seeking to enforce its no subcontracting clauses to the exclusion of Local 1190 by the referral to arbitration under section 124 of grievances for alleged breaches thereof. This was often coupled with the simultaneous filing of applications seeking relief under the provisions of section 1(4) of the Act and further complaints under the provisions of section 89. Local 1190 was as active in the pursuit of its objectives seeking recourse in those same provisions of the Act and as well in the self-contained "code" governing the resolution of jurisdictional disputes as contained in section 91 of the Act. The number of applications and counter-applications filed pursuant to these various provisions of the Act over the next several years is quite formidable. Many were settled, withdrawn, or simply not proceeded with. Others were more vigorously prosecuted and these we highlight here. It is important to recognize that underlying all of these proceedings was a common objective and unifying theme - the assault of the integrity of the bargaining relationships each of the protagonists was attempting to maintain and expand. Of particular relevance for our purposes was the continual and unabated assault by Local 1190 on Local 183's principal instrument for solidifying its position within the residential framework sector - the subcontracting clause as found within its collective agreements. Like a recurring refrain, Local 1190 sought in its many applications a declaration that either the underlying collective agreement, or at least the no subcontracting clauses therein contained should be declared invalid, void and of no effect. We turn to the principal applications filed.

11. In March, 1984 Local 1190 filed two related applications, a section 1(4) against three contractors, *Attica Investment Inc., T/A Fairbank Carpentry, and E. & R. Carpentry Inc.*, (Board File 2984-83-R); and a section 89 complaint against Local 183 (Board File 2985-83-U). The section 1(4) matter was settled to the satisfaction of all parties concerned, and the section 89 complaint withdrawn by Local 1190. Now although Local 1190 there did not directly attack the subcontracting clauses found in the Local 183 collective agreements, both *Attica* and *E. & R. Carpentry* filed

replies seeking the same declaration of nullity which we have seen in earlier Local 1190 applications. As noted, however, these matters were resolved directly between the parties. This preliminary skirmish was followed by a series of more hotly contested applications commencing in the summer of 1984.

12. First of these was the filing by Local 183 of a Referral of Grievance to Arbitration under section 124 of the Act alleging breach by a contractor, Lakeview Estates of the no-subcontracting clause to which it was bound as a result of a so-called "pickup" agreement between it and Local 183 whereby the terms of the collective agreement between the Local and the Toronto Housing Labour Bureau became binding upon it (Board File 0985-84-M). Five days subsequent to the filing of that referral, Local 183 filed an application under the provisions of subsection 1(4) of the Act in respect of two contractors which it alleged were carrying on associated or related activities so as to constitute a single employer within the meaning of the statute - *Montemar Construction Ltd.*, and *Trimar Carpentry* (Board File 1023-84-R). We are familiar with Montemar from the earlier certification proceedings and indeed Local 183 had been certified as bargaining agent for its employees engaged in frame carpentry work by Board certificate dated November 1, 1983 (Board File 0746-81-R). Trimar was engaged as the framing carpentry subcontractor on the Lakeview site. (The Lakeview and Trimar matters, although dealt with separately by the Board, were in fact interrelated in the history of the two sets of proceedings.) In October, 1984 Local 183 filed a section 89 complaint against Local 1190, Trimar and Montemar (Board File 1736-84-U). That complaint and the section 1(4) application (Board File 1023-84-R) were consolidated and listed for hearing in January 1985 and at that time the Board directed that it would deal first with the question of the status of Local 1190 to intervene in the section 1(4) proceedings as a preliminary matter and entertained evidence in that regard. Since then (and subsequent to the hearings in the instant case), the Board has varied that direction by decision dated March 24, 1987 and directed that both the section 1(4) application and the section 89 complaint be set down for hearing on the merits.

13. Hearings in the section 124 grievance proceedings against *Lakeview Estates*, (Board File 0985-84-M) were adjourned after the Board ruled that Local 1190, which had appeared at the proceedings had established a *prima facie* case that the grievance involved a dispute over the assignment of work which ought more properly to be dealt with under the jurisdictional dispute provisions under the Act. Local 1190, which claims bargaining rights for the employees of Trimar, subsequently filed a complaint under section 91 of the Act (Board File 1201-84-J) and hearings in that matter were held in the fall of 1984 concurrently with the proceedings in Board Files 1023-84-R and 1736-84-U before panels of the Board differently constituted but both chaired by Vice-Chair Satterfield. Local 183 argued vigorously in the section 91 proceedings as a preliminary matter that the Board ought to refuse to entertain the complaint it being an abuse of its process in light of the identical nature of the allegations made therein and in the section 89 complaint filed by Local 1190 against Local 183 that had been adjourned almost one year earlier (Board File 0554-83-U). The Board reserved on that preliminary motion, finally argued in January 1985, but has since the hearing of the instant case issued a decision declining to exercise its discretion to refuse to entertain the section 91 complaint as sought by Local 183 and directed that the matter be relisted for hearing (decision dated April 13, 1987, Board File 1201-84-JD). The matter has since been set down to be heard by a panel of the Board differently constituted on October 7 and 8, 1987.

14. Meanwhile, Local 183's defensive actions against what it perceived as intrusions by Local 1190 into the residential framing sector continued unabated. Various other section 124 referrals were filed against Lakeview Estates, the thrust and intent of which was similar to that first filed in Board File 0985-84-M which had prompted the section 91 complaint by Local 1190. In December 1984 those multiple grievance proceedings by Local 183 against Lakeview Estates were settled (Board Files 0985-84-M, 1504-84-M and 2386-84-M). Nor was Local 1190 inactive. In October 1984

it filed a section 89 complaint against Local 183 and two contractors, *Karl Thier Construction Ltd. and Penka Carpentry Ltd.*, (Board File 2006-84-U) and a related section 1(4) application against the two contractors (Board File 2133-84-R). Local 1190 holds bargaining rights for Karl Thier and, in fact, the matter was settled to its satisfaction and the complaint against Local 183 withdrawn. That occurred in early December 1984 at approximately the same time that Local 183 had settled its several section 124 grievance referrals with Lakeview Estates. It is to be recalled that Local 1190 had sought status at those proceedings as well, and indeed at the time of the settling of these matters between the principal parties, Local 1190 advised Local 183 that it intended to file a further section 89 complaint against it on terms substantively identical to those in Board File 0554-83-U. (It is to be recalled that Local 1190 had, in early November 1984, requested of the Board a resumption of hearings in that matter). Now, although no such complaint was ever filed, a draft was in fact given to Local 183 at that time, and a copy has since been filed in evidence in these proceedings. There the complainant seeks the same relief earlier sought, a declaration of nullity of the purported collective agreement between Lakeview and Local 183 or, in the alternative, of the subcontracting clauses contained therein. Of particular note is the admission found in the draft section 89 complaint that the allegations made against Local 183 and the issues raised are identical there and in Board Files 0554-83-U, 0985-84-M, 1201-84-JD, 1504-84-M, and 2386-84-M.

15. Now this same admission is made here before us, although in adumbrated and perhaps even more pointed form at paragraph 17 of Schedule A to the complaint filed which is on the following terms:

"The same issues raised by this complaint are also raised in a complaint between Local 1190 and Local 183 (Board File #0554-83-U), which Local 1190 has asked the Board to re-list for hearing."

The relief sought here is a declaration that the purported collective agreements between Bramalea and Presidential on the one hand, and Local 183 on the other, are null and void or, alternatively, that the subcontracting clauses contained therein are null and void and have no force and effect. This is but a particularized version of the general relief sought against Local 183 and an enumerated list of employer respondents in Board File 0554-83-U long since adjourned. It is common ground between the parties however that that complaint and the instant one cannot be consolidated. Local 183, supported by the interveners, argues that we ought not to entertain this complaint on several grounds: it constitutes an abuse of process; there has been unconscionable delay in its prosecution; the matter is *res judicata*.

16. The latter argument is a convoluted one and rests on our reading as implicit in the Board's direction for the taking of a representation vote in *Attica Investment Inc. T/A Fairbank Carpentry and E. & R. Carpentry Inc.*, (Board File 3304-84-R), a determination of the validity of the subcontracting clauses here attacked. In light of our determination on the question of abuse and delay, we find it unnecessary to canvass in any detail the doctrine of *res judicata*, although we would note, if pressed, that the cryptic direction relied upon is surely too tenuous a foundation on which to structure such an argument, and indeed the decision of the Supreme Court of Canada in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 would appear to preclude its application in any event. We turn then to consider the issues of abuse and delay, which we see as closely interrelated factors which cannot but lead us to exercise our statutory discretion against the complainant by declining to entertain this application as requested.

17. A recurrent theme found in the jurisprudence emanating from both the Labour Boards and the Courts is that delay is inimical to the furthering of a healthy collective bargaining relationship. Mr. Justice Pigeon captured the essence of that theme in *Komo Construction Inc. et al. v. Commission des Relations de Travail du Quebec, et al.* [1968], S.C.R. 172 when he cautioned:

“Il ne faut pas oublier que la Commission exerce sa juridiction dans une matiere ou generale-ment tout retard est susceptible de causer un prejudice grave et irremediable” (at p. 176).

The same theme is echoed in the truism “Labour relations delayed are labour relations defeated and denied” often repeated in decisions of both Boards and Courts. See *General Bearing Services Ltd.*, [1980] OLRB Rep. Aug. 1200 where both Board and Court decision are collected. It is said that this concern is particularly acute in certification proceedings (*ibid* p. 1202), although it is by no means so limited. It is a concern expressed as well in proceedings such as these where a complaint of unfair labour practice has been filed against a party or parties alleging breach of our labour legislation. Indeed, in several jurisdictions, legislators particularly sensitive to the “prejudice grave et irremediable” which could arise in the failure to prosecute such a complaint timeously have limited severely the time period within which these may be filed. See for example the *New Brunswick Industrial Relations Act*, RSNB 1973 c. I-4, s.106(11) - 90 days; the *Canada Labour Code*, R.S.C. 1970, C.L-1 (as amended), Div. IV, s.187(2) - 90 days and see as well *Upper Lakes Shipping Ltd. v. Shehan et al.* (1979), 95 D.L.R. (3d) 25 (S.C.C.). In jurisdictions such as ours, the concern is not the less acute solely because of the absence of such a statutory time bar. Rather, it has been subsumed into and found expression in the Board’s jurisprudence with respect to the statutory discretion vested in it by section 89 of the Act to entertain a complaint filed pursuant to its provisions.

18. The underlying collective bargaining principles which inform the Board’s exercise of its discretion, and the relevant factors to consider where it is asked to exercise its discretion against the complainant are best expressed in the *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420, where Vice-Chair MacDowell, speaking for the panel, wrote:

20. It is by now almost a truism that time is of the essence is labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C. G. E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited*, [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties’ current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board’s view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length

of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involved retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

See as well *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113, application for judicial review *sub. nom.*; *Re Dhanota and International Union United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.)*, Local No. 1285; *Sheller-Globe of Canada Ltd.*, (1983) 148 D.L.R. (3d) 569 (H.C.J., Div. Ct.) dismissed.

19. In calculating a measurement "in months rather than years", it does not avail the complainant to plead that the particular collective agreements and the contracting clauses which they contain are of a recent provenance. The Toronto Housing Labour Bureau, of which Bramalea Limited is a member, has had a collective agreement on identical terms with Local 183 since 1983; similarly so in the case of the Presidential Group Limited and Presidential Group (Brookshire) Limited. Nor may the complainant assert that its causes of action arises in the attempt by Local 183 to enforce the provisions of the impugned subcontracting clauses against the contractors bound, either formally as in the case of Presidential (Board File 1324-85-M) or informally as in the case of Bramalea, both of which incidents occurred shortly before the filing of the instant complaint. To do so would be to elevate form over substance in a manner which would make a mockery of the fundamental collective bargaining principles which inform the Board's determinations in the exercise of its section 89(4) discretion in much the same manner that the late Chief Justice Laskin characterized the attempted filing of a complaint of unfair labour practice in the *Upper Lakes Shipping* case, *supra*, in the face of a statutory time bar. He wrote there at p. 29:

"I do not disagree with the Federal Court of Appeal that it was appropriate to measure the timeliness of a complaint from March 1, 1973 when the subject matter thereof became a prohibited practice. However, I cannot agree that there can be any number of requests and refusals, relating to the same circumstances, to enable a complainant to found a succession of complaints under section 187(1) so long as he takes care to bring them successively within ninety days of any requested and refusal. That would make a mockery of section 187(2) even if it was applicable irrespective of *res judicata*, which was not mentioned by the Federal Court of Appeal."

Here, there is no question but that the substance of this complaint long predates the particular agreements and incidents complained of. Indeed, the collective bargaining relationships between Bramalea, Presidential and Local 183 serve merely as a convenient foil for the prosecution of a complaint which Local 27 and its predecessor in title, Local 1190, have had against Local 183 and any and all of the many contractors, developers and builders within the residential housing sector with which it has a bargaining relationship since the commencement of this representational dispute in 1981. This is as much as admitted by the complainant in this very application when it advises that the issues here raised are identical to those raised in its earlier filed complaint - Board File 0554-83-U. Surely, it was with the filing of that complaint in June 1983 that the issue here sought to be litigated crystallized and the incidents here related and complained of could be, at most, subsequently materialized particulars in that original complaint.

20. On such a reading of the matter it becomes a foregone conclusion that the delay here occasioned must be fatal to the filing of this complaint. Each of the factors enumerated above in the Mississauga case can only be marshalled against the interest of the complainant. The length of

the delay is excessive and arises years after it had become aware of the alleged statutory violations; the nature of the remedy claimed would strike at the heart of a pattern of hundreds of bargaining relationships which have developed, flourished and expanded within the residential framing sector of the construction industry since the alleged contravention first arose; there is in addition the existence of factors which would hamper and impede a fair hearing of the issues in the setting of freshly filed section 89 proceedings, including fading recollection, unavailability of witnesses, deterioration of evidence and the disposal of records. From all the foregoing, the Board concludes that, setting aside for a moment the convoluted history of the struggle between these two protagonists, the delay in the prosecution of a section 89 complaint by Local 27 attacking the integrity of the bargaining relationships entered into by Local 183 on the strength of no subcontracting clauses of which Local 27 or its predecessor Local 1190 were aware from their first inception and with respect to which exception has been taken in principle from almost that same moment, would alone suffice for the Board to conclude that it ought to exercise its section 89(4) discretion to refuse to entertain the complaint here filed.

21. There is, however, a further consideration which impels the Board to this conclusion, and that is the abuse inherent in the very filing of the instant complaint. For our reading of the circumstances of this case make it at once clear to even the most casual observer, that the complainant here has sought to file identical section 89 complaint proceedings arising out of the same cause. Not only that, but the earlier complaint filed stands adjourned, if not at the instance, then at least on the consent of the complainant at the very moment when counsel for Local 183 was on the point of cross-examining the principal witness of the complainant who, whether by way of evasion or innocent happenstance, had avoided service of a subpoena *duces tecum* issued at the instance of Local 183. In such circumstances, to acquiesce as requested and entertain the instant complaint would be to countenance the most flagrant abuse of the Board's process. It is simply inconceivable that a tribunal judicially charged would permit the suspension of litigation already in process and its refiling and prosecution anew at the instance of the complainant. In circumstances somewhat analogous to these, McRae, J. has characterized the bringing of multiple proceedings arising out of the same circumstances and seeking the same relief as "frivolous and vexatious". See *Mascan Corporation v. French* (1986) 8. C.P.C. (2d) 187 (H.C.J.). We are of a similar mind and, if so required, would, even in the absence of the delay here present, have exercised our section 89(4) discretion against the complainant as the filing of the instant complaint is an abuse of the Board's process. We do so cognizant of the decision of the Satterfield panel in Board File 1201-84-JD refusing to exercise a similar discretion when so requested, but note that there separate and distinct section 91 jurisdictional dispute proceedings were in train.

22. Where then stands the substance of this complaint first asserted in the now long since adjourned 1983 proceedings between these same parties in Board File 0554-83-U? Notwithstanding the already noted protestations made by counsel for both Local 183 and 27 of our lack of jurisdiction to consider that matter, each curiously argued fully its status, the one that it is abandoned and defunct, the other that it remains vibrant and ripe for consideration. Although sorely tempted to "cut the Gordian knot" and seize this occasion to rule on the status of those proceedings, the Board declines to do so, not, however, without noting that surely the decision of the High Court in *Re Fisher et al. and Hotels, Clubs, Restaurants, Tavern Employees Union, Local 261 et al.* (1980) 28 O.R. (2d) 462 (H.C.J.) must silence any argument that Practice Note 14 could dictate in an absolute sense the Board's exercise of its discretion as master of its own practice and procedure under section 102(13) of the Act as to whether to permit that case to proceed. This is particularly so where at issue is the bringing of a matter to trial with some reasonable dispatch. See *Romano v. Ciraco et al.*, (1986) 4 C.P.C. (2d) 291 (Ont.) (H.C.J.) and the cases there noted. With that caveat the Board hereby directs that the Registrar relist for hearing Board File 0554-83-U for the purpose of determining its status. That panel shall determine whether this sword of Damocles hanging sus-

pended these many years will now plunge down to sever the bargaining relationships there challenged or rather be seized and flung aside saving them harmless. It goes without saying that any delay occasioned by the dilatory conduct of the Board itself will not prejudice the complainant in that determination.

23. This complaint is dismissed.

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**0538-87-R; 0662-87-U United Food & Commercial Workers International Union, Local 1230, Applicant/Complainant v. United Canadian Malt Ltd., Respondent**

**Practice and Procedure - Sale of a Business - Parties informing Board that they had agreed there had been a sale of the business to the respondent - Board must be satisfied that it has jurisdiction under section 63 to make a declaration despite the agreement of the parties - Parties asked to set out the facts upon which their agreement was based - Board satisfied that sale had occurred**

**BEFORE:** *Patricia Hughes*, Vice-Chair, and Board Members *J. F. Davidson* and *R. R. Montague*.

**APPEARANCES:** *L. A. Richmond*, *Bruce Zufelt* and *Jim Curtis* for the applicant/complainant; *K. W. Kort* for the respondent.

**DECISION OF THE BOARD;** August 27, 1987

1. File No. 0538-87-R is an application by United Food & Commercial Workers International Union Local 1230 ("the union") for a declaration that the respondent United Canadian Malt Ltd. ("United Canadian Malt") is a successor employer to Wander Foods, A Division of Sandoz Canada Ltd. ("Wander Foods") with which the union had a collective agreement. File No. 0662-87-U is a complaint by the union that United Canadian Malt has contravened section 89 of the *Labour Relations Act* ("the Act").

2. At the outset of the hearing the parties informed the Board that they had agreed there had been a sale from Wander Foods to United Canadian Malt. Despite the agreement of the parties, the Board must be satisfied it has jurisdiction under section 63 to make a declaration under that section: *Elmont Construction Limited*, [1987] OLRB Rep. Feb. 209. Accordingly, we asked the parties to set out the facts upon which their agreement was based. The representative of United Canadian Malt informed the Board that in May 1987 United Canadian Malt acquired business premises located at Peterborough, Ontario, owned by Wander Foods and started a business similar to part of the business carried out by Wander Foods. United Canadian Malt acquired customer lists and equipment from Wander Foods and also hired six persons who had been employees of Wander Foods (prior to the purchase, most of the employees had been laid off by Wander Foods).

3. On the basis of the agreed statement, we are satisfied that there has been a sale of a business from Wander Foods to United Canadian Malt as of May 5, 1987 and United Canadian Malt is the successor employer to Wander Foods.

4. We are also satisfied that the union became the successor to United Food & Commer-

cial Workers International Union Local 293-2 ("Local 293-2") effective December 13, 1984 and United Canadian Malt has treated the Union as such.

5. The parties agreed to adjourn the outstanding matters in File Nos. 0538-87-R and 0662-87-U to pursue settlement of those matters. Accordingly, both matters are adjourned *sine die* for a period not exceeding one year. Unless within that time either party requests that the Board proceed with these matters, they will be terminated.

6. This panel of the Board is seized with this matter.

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## CASE LISTINGS AUGUST 1987

	PAGE
1. Applications for Certification .....	213
2. Applications for First Contract Arbitration .....	224
3. Applications for Declaration of Related Employer.....	224
4. Sale of a Business .....	225
5. Union Successor Rights .....	225
6. Applications for Declaration Terminating Bargaining Rights.....	225
7. Referral Concerning Appointment of Conciliation Officer.....	226
8. Applications for Declaration of Unlawful Strike .....	226
9. Applications for Declaration of Unlawful Strike (Construction Industry) .....	227
10. Complaints of Unfair Labour Practice .....	227
11. Applications for Consent to Early Termination of Collective Agreement .....	229
12. Applications for Determination of Employee Status .....	229
13. Complaints Under the Occupational Health & Safety Act .....	230
14. Construction Industry Grievances .....	230



## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1987

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**0284-85-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. 340480 Ontario Limited, c.o.b. as Concrete Forming (1980) and Concrete Forming (London) Limited (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working forepersons and persons above the rank of non-working forepersons" (22 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working forepersons" (22 employees in unit)

**3103-86-R:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Taplen Construction (1977) Ltd. (Respondent)

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**3261-86-R:** Retail, Wholesale & Department Store Union (Applicant) v. 598142 Ontario Limited, c.o.b. as Spooner's Restaurant (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at London, save and except department managers and persons above the rank of department manager, office and clerical staff" (70 employees in unit) (*Having regard to the agreement of the parties*)

**0058-87-R:** United Food & Commercial Workers International Union, AFL:CIO:CLC: (Applicant) v. Southrim Enterprises Ltd., c.o.b. as Southrim Continuing Care Services and Belcrest (Toronto) Nursing Homes Ltd., c.o.b. as the Roulet Nursing Home Unit of Southrim Continuing Care Services (Respondents)

Unit: "all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, registered graduate and undergraduate nurses, professional medical staff, paramedical employees, office and clerical staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

**0246-87-R:** Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Austin's Nursing Home Ltd. (Respondent)

Unit #1: "all employees of the respondent in Shelburne save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and

students employed during the school vacation period” (22 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent in Shelburne regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0482-87-R:** Ontario Nurses’ Association (Applicant) v. General Motors of Canada Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: (see: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

Unit #2: “all registered and graduate nurses regularly employed for not more than 24 hours per week employed in a nursing capacity by the respondent in Oshawa, save and except supervisors and those above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0769-87-R:** Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. 619138 Ontario Inc. (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in all other sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, and persons for whom Labourers’ International Union of North America, Local 183 held bargaining rights on June 12, 1987” (4 employees in unit)

**0823-87-R:** Christian Labour Association of Canada (Applicant) v. Wimbledon Investments Limited, c.o.b. as Simcoe Terrace (Respondent)

Unit #1: “all employees of the respondent in Barrie, save and except registered and graduate nurses, supervisor, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (20 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

**0847-87-R:** Lumber and Sawmill Workers’ Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Current Bay Enterprises Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

**0877-87-R:** Labourers’ International Union of North America, Local 1036 (Applicant) v. The Corporation of the City of Sault Ste. Marie (Respondent) v. R.E. Morcan, CUPE National Representative on behalf of Local 3, Canadian Union of Public Employees (Intervener #1) v. United Brotherhood of Carpenters & Joiners of America, Local 446 (Intervener #2)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

**0889-87-R:** Canadian Paperworkers Union (Applicant) v. T.R.S. Food Service Ltd. (Respondent)

Unit: “all employees of the respondent employed in Brockville, Tincap, Smiths Falls, Prescott, Maitland, Long Sault and Iroquois, save and except chef, supervisors, persons above the rank of supervisor, office and clerical staff” (15 employees in unit) (*Having regard to the agreement of the parties*)

**0913-87-R: Ontario Nurses’ Association (Applicant) v. ReliaCARE Inc. (Respondent)**

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent at its Elmwood Place Nursing Home in London, save and except the Director of Nursing, persons above the rank of Director of Nursing, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all registered and graduate nurses employed in a nursing capacity for not more than 24 hours per week and students employed during the school vacation period by the respondent at its Elmwood Place Nursing Home in London, save and except the Director of Nursing and persons above the rank of Director of Nursing” (4 employees in unit) (*Having regard to the agreement of the parties*)

**0921-87-R: Canadian Paperworkers Union (Applicant) v. Pluswood Mfg. Ltd. (Respondent)**

Unit: “all employees of the respondent in Atikokan, save and except foreman, persons above the rank of foreman, sales, office and clerical staff” (103 employees in unit) (*Having regard to the agreement of the parties*)

**0924-87-R: United Steelworkers of America (Applicant) v. Aluminor Limited (Respondent) v. Group of Employees (Objectors)**

Unit: “all employees of the respondent at 180 Commander Boulevard and 335 Finchdene Square in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, field installers and students employed during the school vacation period” (61 employees in unit)

**0927-87-R: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Rayco Construction Inc. (Respondent) v. Group of Employees (Objectors)**

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, in the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**0930-87-R: Aluminum, Brick & Glass Workers International Union, AFL-CIO-CLC (Applicant) v. The International Union United Automobile Aerospace & Agricultural Implement Workers of America (UAW-CLC), Local 251 (Respondent)**

Unit: “all employees of the respondent in the Town of Wallaceburg, save and except all elected or appointed union officials, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of July 3, 1987” (2 employees in unit) (*Having regard to the agreement of the parties*)

**0938-87-R: United Food & Commercial Workers International Union (Applicant) v. Coca Cola Foods Canada Inc. (Respondent)**

Unit: “all office and clerical employees of the respondent in the City of Peterborough, save and except plant supervisors, persons above the rank of plant supervisor and secretary to the plant manager” (4 employees in unit) (*Having regard to the agreement of the parties*)

**0939-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. LOF Glass of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in Lindsay, Ontario, save and except process leaders, persons above the rank of process leader and office and sales staff" (391 employees in unit) (*Having regard to the agreement of the parties*)

**0946-87-R:** United Steelworkers of America (Applicant) v. Jireh Machseh Limited (Respondent)

Unit: "all employees of the respondent in the City of Sault Ste. Marie, save and except assistant administrators, those above the rank of assistant administrator, registered and graduate nurses, secretary to the chief administrator and the administrator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0947-87-R:** United Steelworkers of America (Applicant) v. Jireh Machseh Limited, (Respondent)

Unit: "all employees of the respondent in the City of Sault Ste. Marie regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant administrators, those above the rank of assistant administrator, registered and graduate nurses, and secretary to the chief administrator and the administrator" (11 employees in unit) (*Having regard to the agreement of the parties*)

**0948-87-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Acme Building & Construction Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquimesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

**0949-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Morgan Welding Supply Company Limited (Respondent)

Unit #1: "all employees of the respondent at 497 Second Line East, Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all office, clerical and inside sales staff of the respondent at 497 Second Line East, Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, outside salesmen, purchasing agent, secretary to the Branch Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #3: "all employees of the respondent at 677 MacDonald Ave., Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, purchasing agent, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

**0953-87-R:** United Steelworkers of America (Applicant) v. Advance Floor Machine Company Canada Limited (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

**0969-87-R:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Tony Olsen Enterprises (Respondent)

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0975-87-R:** Office & Professional Employees International Union (Applicant) v. Iroquois Falls Community Credit Union Limited (Respondent)

Unit: "all employees of the respondent in the Town of Iroquois Falls, save and except administration officer and persons above the rank of administration officer" (5 employees in unit) (*Having regard to the agreement of the parties*)

**0994-87-R:** Sheet Metal Workers' International Association Local Union 537 (Applicant) v. Braun Nursery Limited (Respondent)

Unit: "all employees of the respondent at its plant in the Township of Glanbrook, save and except forepersons, those above the rank of foreperson, office, clerical and sales staff" (39 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0995-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Donegan's Haulage Limited (Respondent)

Unit: "all employees of the respondent working at or out of Listowell, save and except foremen, persons above the rank of foremen, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (34 employees in unit) (*Having regard to the agreement of the parties*)

**1000-87-R:** Ontario Nurses' Association (Applicant) v. Deem Management Services Limited (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the City of Waterloo, save and except the Director of Nursing and persons above the rank of Director of Nursing" (7 employees in unit) (*Having regard to the agreement of the parties*)

**1009-87-R:** International Woodworkers of America (Applicant) v. G.W. Martin Wood Products Limited (Respondent)

Unit: "all employees of the respondent in the City of Belleville, save and except forepersons, those above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*)

**1010-87-R:** Service Employees' Union, Local 210, S.E.I.U., AFL-CIO-CLC (Applicant) v. Blue Water Rest Home (Respondent)

Unit: "all employees of the respondent at Zurich, Ontario, who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, supervisors and persons above the rank of supervisors, and office staff" (22 employees in unit)

**1025-87-R:** International Brotherhood of Painters & Allied Trades Local Union 1891 (Applicant) v. C & D Plastering Ltd. (Respondent)

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Clarity Note*)

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Clarity Note*)

**1057-87-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Bar-Bro Construction Limited (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, in all other sectors of the construction industry, except the industrial, commercial and institutional sector, in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**1059-87-R:** United Headwear, Optical & Allied Workers Union of Canada, Local 4 (Applicant) v. Imperial Optical Company Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Welland, save and except forepersons, those above the rank of foreperson, licensed ophthalmic dispensers, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

**1073-87-R:** Ironworkers' District Council of Ontario (Applicant) v. Var-Cor Portable Welding (Respondent)

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**1085-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Mechanical Cables Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Barrie, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (95 employees in unit) (*Having regard to the agreement of the parties*)

**1101-87-R:** International Brotherhood of Painters & Allied Trades, Local 557 (Applicant) v. Wallcraft Painting & Decorating Ltd. (Respondent)

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

**1121-87-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, (CAW-Canada) (Applicant) v. Moore Corporation Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Trenton, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period, and persons employed on a co-operative training basis with a recognized college or university” (194 employees in unit) (*Clarity Note*)

**1136-87-R:** Labourers’ International Union of North America, Ontario Provincial Council (Applicant) v. P. B. Rombough Limited (Respondent)

Unit: “all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**1139-87-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. 714018 Ontario Limited, c.o.b. as Executive Taxi & Limousine (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Brockville, save and except manager and persons above the rank of manager, office staff and dispatchers” (16 employees in unit) (*Having regard to the agreement of the parties*)

**1180-87-R:** Labourers’ International Union of North America, Local 1081 (Applicant) v. Brunswick Drywall (Ontario) Limited (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in all other sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the County of Grey, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**1182-87-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Paddock Developments Ltd. (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion and the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

**1241-87-R:** Labourers’ International Union of North America, Ontario Provincial Council, (Applicant) v. Stephen Sura (Canada) Ltd. (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all other sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**1275-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Unidoor Company Limited (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**0920-87-R:** Canadian Paperworkers Union (Applicant) v. E. B. Eddy Forest Products Ltd. (Respondent) v. Office & Professional Employees International Union (Intervener)

Unit: "all office and clerical employees of the respondent in Espanola and in its woods operations located on the respondent's timber limits and work sites save and except assistant foremen, persons above the rank of assistant foreman, secretaries to department managers and above, employees in the personnel department, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of July 2, 1987" (102 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		102
Number of persons who cast ballots	69	
Number of ballots marked in favour of applicant		159
Number of ballots marked in favour of intervener		10

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**0120-87-R:** Canadian Union of Public Employees (Applicant) v. The Sutton & District Association for the Mentally Retarded (Respondent)

Unit: "all employees of the respondent in Georgina Township, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical employees in bargaining units for which any trade union held bargaining rights as of April 10, 1987" (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		17
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		1

**0421-87-R:** United Electrical, Radio & Machine Workers of Canada (Applicant) v. Wakeford Automatics (Peterborough) Limited (Respondent)

Unit: "all employees of the respondent at Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots	19	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		9

**0482-87-R:** Ontario Nurses' Association (Applicant) v. General Motors of Canada Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Oshawa, save and except supervisors, those above the rank of supervisor, and those persons regularly employed for not more than 24 hours per week" (17 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Without Vote*)

Number of names of persons on revised voters' list		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		8

**0525-87-R:** The Association of Allied Health Professionals, Ontario (Applicant) v. The Riverside Hospital of Ottawa (Respondent)

Unit: "all paramedical employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, and employees in the bargaining units for which any trade union held bargaining rights as of May 19, 1987" (68 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		68
Number of persons who cast ballots	44	
Number of ballots marked in favour of applicant		29
Number of ballots marked against applicant		15

### Applications for Certification Dismissed Without Vote

**0463-87-R:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Applicant) v. Construction Metallique CBI Ltée (Respondent) (15 employees in unit)

**0797-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Cupido Construction (Respondent) (3 employees in unit)

**1077-87-R:** United Brotherhood of Carpenters' & Joiners of America, Local 27 (Applicant) v. Feliciano Carpentry Interior Finishing (Respondent) (4 employees in unit)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**1373-86-R:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC, Local 414 (Applicant) v. A. L. Brooks Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Ottawa, save and except department managers, persons above the rank of department manager, office and clerical staff and students employed pursuant to an educational work experience program" (66 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		66
Number of persons who cast ballots	59	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	57	
Number of segregated ballots cast by persons whose names appear on voters' list		2

*(Ballots ordered not counted and destroyed)*

**2963-86-R:** Union des Routiers, Brasseries, Liqueurs Douces & Ouvriers de Diverses Industries, Local 1999 (Teamsters) (Applicant) v. Groupe Unimedia Inc., division de Le Droit (Respondent) v. Syndicat Québécois de l'Imprimerie et de Communication, Local 145 (Intervener)

Unit: "all employees of the respondent at Ottawa employed in its newspaper plant, save and except assistant foremen, persons above the rank of assistant foreman, and persons for whom any trade union held bargaining rights as of January 27, 1987" (117 employees in unit)

Number of names of persons on revised voters' list		117
Number of persons who cast ballots	82	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		22
Number of ballots marked in favour of intervener		58

**3180-86-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Rayco Stamping Products Limited (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all employees of the respondent in Windsor, save and except forepersons, persons above the rank of foreperson, office and sales staff, security guards, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (113 employees in unit)

Number of names of persons on voters' list		113
Number of persons who cast ballots	108	
Number of ballots marked in favour of applicant		49
Number of ballots marked in favour of intervener		56
Ballots segregated and not counted		3

**0647-87-R:** United Food & Commercial Workers International Union (Applicant) v. Bray, Ball & Associates Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Southwest Oxford Township, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Clarity Notes*)

Number of names of persons on revised voters' list		22
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		18
Ballots segregated and not counted		1

**0793-87-R:** United Rubber, Cork, Linoleum & Plastic Workers of America, AFL:CIO:CLC (Applicant) v. Thomas Abrasive Products Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Oakville, save and except foremen and supervisors and persons above the rank of foreman and supervisor and office and sales staff" (41 employees in unit)

Number of names of persons on revised voters' list		41
Number of persons who cast ballots	39	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		28
Ballots segregated and not counted		1

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0362-87-R:** United Steelworkers of America (Applicant) v. Smith, Irwin & Conley Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Smiths Falls, Ontario, save and except forepersons, those above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (52 employees in unit)

Number of names of persons on revised voters' list		52
Number of persons who cast ballots	51	
Number of ballots marked in favour of applicant		25
Number of ballots marked against applicant		25
Ballots segregated and not counted		1

**0619-87-R:** Christian Labour Association of Canada (Applicant) v. D. J. Fast Trucking Contractors Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, dispatcher, office and sales staff" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		33
Number of persons who cast ballots	30	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		22
Ballots segregated and not counted		2

**0823-87-R:** Christian Labour Association of Canada (Applicant) v. Wimbledon Investments, c.o.b. as Simcoe Terrace (Respondent)

Unit: "all employees of the respondent in Barrie regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, and office and clerical staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		5

### Applications for Certification Withdrawn

**1125-84-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Ottawa Board of Education (Respondent) v. Canadian Union of Public Employees (Intervener)

**1836-86-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Olympia & York Developments Limited, c.o.b. as Olympia Floor & Wall Tile Co. (Respondent) v. Group of Employees (Objectors)

**2739-86-R:** Motion Picture Projectionists' Union, Local 303 of the International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Hamilton, Ontario (Applicant) v. Famous Players Limited (Respondent)

**0402-87-R:** Canadian Union of Public Employees (Applicant) v. Corporation of the County of Dufferin (Respondent)

**0449-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Decor Insulation & Drywall Ltd., formerly Ormesher Decor (1980) Ltd. (Respondent)

**0952-87-R:** United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. City of Sault Ste. Marie (Respondent)

**0980-87-R:** United Steelworkers of America (Applicant) v. Steetley Talc Inc. (Respondent)

**0985-87-R:** Ottawa Graphic Communications Union, Local 62N (Applicant) v. The Citizen, division of Sout-ham Inc. (Respondent) v. Ottawa Typographical Union, Local 102 (Intervener)

**1026-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Appli-cant) v. Stephen Sura (Canada) Ltd. (Respondent)

**1087-87-R:** Canadian Transport Workers Union (Applicant) v. J.E. Transport Inc., Intermodal Division (Res-pondent)

**1088-87-R:** Canadian Transport Workers Union (Applicant) v. Santana Transport Ltd., division of J.E. Transport Inc. (Respondent)

**1103-87-R:** Labourers' International Union of North America, Ontario Provincial District Council (Appli-cant) v. Curbwalk Construction Ltd. (Respondent)

**1232-87-R:** Service Employees Union, Local 183 (Applicant) v. Morden's S.D. Transport L.T.D. (Respon-dent)

**1298-87-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Anzano Construction Ltd. (Respondent)

## **APPLICATIONS FOR FIRST CONTRACT ARBITRATION**

**0876-87-FC:** United Steelworkers of America (Applicant) v. Tecsyn Canada Limited (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER**

**2311-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Lap-Ron Con-struction Limited, and Optimum Contracting Limited (Respondents) (*Withdrawn*)

**0342-87-R:** Ironworkers District Council of Ontario (Applicant) v. New Jersey Steel Fabricators (also known as 584994 Ontario Inc.), and New Jersey Steel (also known as 671088 Ontario Limited) (Respondents) (*Withdrawn*)

**0375-87-R:** Canadian Transport Workers Union (Applicant) v. Listowel Transport Lines Limited, J.E. Trans-port Limited, J.E. Transport Inc., and London Cartage & Delivery Limited (Respondents) (*Withdrawn*)

**0832-87-R:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Raymar Mechanical Ltd., and J.P. Clarke Mechanical Limited (Respondents) (*Withdrawn*)

**0885-87-R:** Health Office & Professional Employees, division of United Food & Commercial Workers Union, Local 175 (Applicant) v. 229259 Ontario Limited, c.o.b. as Cedarcrest Nursing Home Limited, and Paragon Health Care Inc. (Respondents) (*Withdrawn*)

**1086-87-R:** Southrim Enterprises Ltd., c.o.b. as Southrim Continuing Care Services, and Belcrest (Toronto) Nursing Homes Ltd., c.o.b. as the Roulet Nursing Home, unit of Southrim Continuing Care Services (Appli-cant) v. United Food & Commercial Workers International Union, AFL:CIO:CLC (Respondents) (*Granted*)

## SALE OF A BUSINESS

**2312-86-R:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Lap-Ron Construction Limited, and Optimum Contracting Limited (Respondents) (*Withdrawn*)

**0213-87-R:** International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 582, Brantford, Ontario (Applicant) v. David Babcock (Respondent) (*Withdrawn*)

**0518-87-R:** International Union of Elevator Constructors, Local 90 (Applicant) v. Armor Elevator S.W. Ontario Co., division of 349528 Ontario Ltd., and Riverside Elevators Inc. (Respondents) (*Withdrawn*)

**0545-87-R:** United Rubber, Cork, Linoleum & Plastic Workers of America, Local 994 (Applicant) v. The Great Canadian Soup Co. Ltd. (formerly 689499 Ontario Ltd.) (Respondent) (*Withdrawn*)

**0752-87-R:** Hotel & Restaurant Employees Union, Local 75 (Applicant) v. Monarch Foods Inc., c.o.b. as Harvey's Restaurant (Respondent) (*Withdrawn*)

**0833-87-R:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Raymar Mechanical Ltd., and J.P. Clarke Mechanical Limited (Respondents) (*Withdrawn*)

**0858-87-R:** IBEW, Local 2133 (Applicant) v. St. Lawrence Power Co. & Cornwall Electric (Respondent) (*Withdrawn*)

**0884-87-R:** Health Office & Professional Employees, division of United Food & Commercial Workers, Local 175 (Applicant) v. 229259 Ontario Limited, c.o.b. as Cedarcrest Nursing Home Limited, and Paragon Health Care Inc. (Respondents) (*Withdrawn*)

## UNION SUCCESSOR RIGHTS

**0624-87-R:** Canadian Textile & Chemical Union (Applicant) v. Bond Place Hotel Limited (Respondent) (*Granted*)

**0625-87-R:** Canadian Textile & Chemical Union (Applicant) v. Federated Building Maintenance Limited (Respondent) (*Granted*)

## APPLICATIONS FOR TERMINATION OF BARGAINING RIGHTS

**2702-86-R:** Hakim Samad (Applicant) v. Energy & Chemical Workers Union (Respondent) v. C. E. Jamieson & Co. (Dominion) Limited (Intervener)

Unit: "all employees of the intervener at its Windsor Plant, save and except supervisors and foremen, persons above the ranks of supervisor and foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (43 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		43
Number of persons who cast ballots	39	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		17
Number of ballots marked against respondent		18
Ballots segregated and not counted		3

**0475-87-R:** Susan Thayer, Janet Callaghan & Stella MacMillan (Applicants) v. Canadian Union of Public Employees (Respondent)

Unit: "all office and clerical employees of the F. J. Davey Home, Sault Ste. Marie, Ontario, save and except

supervisors and persons above the rank of supervisor, persons above the rank of supervisor, persons covered by subsisting collective agreements, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

**0753-87-R:** Frank Williamson, and Group of Employees (Applicants) v. Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. The Derby Pet Foods Limited (Intervener)

Unit: "all employees of The Derby Pet Foods Limited in the City of Brampton and the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period" (32 employees in unit) (*Granted*)

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	34	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	32	
Number of segregated ballots cast by persons whose names do not appear of voters' list	2	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		11
Number of ballots marked against respondent		22

**0794-87-R:** Pam Little, on behalf of a Group of Employees of the Brick Brewing Co. Limited (Applicant) v. United Food & Commercial Workers International Union, Local 173W (Respondent) v. Brick Brewing Co. Limited (Intervener)

Unit: "all employees of Brick Brewing Co. Limited at Waterloo, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation, save and except supervisors, persons above the rank of supervisor, office and sales staff and employees covered under the full-time collective agreement" (6 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		4

**1134-87-R:** Pauline Levert (Applicant) v. Hotels, Clubs, Restaurants, Taverns Employees' Union, Local 261 (Respondent) (*Withdrawn*)

## REFERRAL CONCERNING APPOINTMENT OF CONCILIATION OFFICER

**2995-86-M:** Oakridge Villa Nursing Home (Extendicare Health Services Inc.) (Employer) v. Ontario Nurses' Association (Trade Union) (*Granted*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**1409-87-U:** The Board of Governors of Exhibition Place (Applicant) v. International Alliance of Theatrical & Stage Employees of the United States & Canada, Local 58, James Fuller, Gary Cuthbertson, and Dave Scafe (Respondents) (*Granted*)

**1426-87-U:** The Board of Governors of Exhibition Place (Applicant) v. Wayne Trahan, Brian Coghlan, and Gordon Rees (Respondents) (*Granted*)

**1433-87-U:** The Board of Governors of Exhibition Place (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 27, Jim Smith, Joe Zarb, and Don MacKay (Respondents) (*Dismissed*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)**

**0373-87-U:** General Contractors' Division of the Construction Association of Thunder Bay Inc. (Applicant) v. Lumber & Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America, and Labourers' International Union of North America, Local 607, and Labourers' International Union of North America, Ontario Provincial District Council (Respondents) v. Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America (Intervener) (*Granted*)

**1179-87-U:** Humboldt Properties Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 353, and Ronald Carroll (Respondent) (*Withdrawn*)

## **COMPLAINTS OF UNFAIR LABOUR PRACTICE**

**2273-85-U:** Graphic Communications International Union, Local 517 (Complainant) v. Windsor Print & Litho Limited (Respondent) (*Withdrawn*)

**2511-86-U:** Wayne Feran (Complainant) v. United Food & Commercial Workers' International Union, Local 743 (Respondent) v. Quality Meat Packers Limited (Intervener) (*Dismissed*)

**2516-86-U:** Ontario Nurses' Association (Complainant) v. Oakridge Villa Nursing Home (Respondent) (*Granted*)

**2681-86-U:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, and John Ceasaroni (Complainants) v. Robert E. Sommerville Company Limited (Respondent) (*Withdrawn*)

**2693-86-U:** Extendicare Health Services Inc. (Complainant) v. Ontario Nurses' Association (Respondent) (*Granted*)

**2836-86-U:** United Steelworkers of America (Complainant) v. N. Pollard & Son Limited (Respondent) (*Withdrawn*)

**2985-86-U:** Penny Kuipers (Complainant) v. The Standard Freeholder, division of Canadian Newspaper Company Limited (Respondent) v. Graphic Communications Union, Local 41M (Intervener) (*Withdrawn*)

**3156-86-U:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 91 (Complainant) v. Maurice Lamoureux Limited - Egg Grading (Respondent) (*Withdrawn*)

**3209-86-U; 3304-86-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. City Cab (Safe Drive, ABC) (Respondent) (*Withdrawn*)

**3496-86-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. ABC Taxi (Brockville) Ltd. and Safedrive Inc., c.o.b. as City Cab (Respondent) (*Respondent*)

**3501-86-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. 598142 Ontario Limited, c.o.b. as Spooner's Restaurant (Respondent) (*Granted*)

**3517-86-U:** Office & Professional Employees International Union, Local 225 (Complainant) v. Supply & Services Union of the Public Service Alliance of Canada (Respondent) (*Granted*)

**3572-86-U:** Maurice Lamoureux Ltée, Poste de Mirage (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Respondent) (*Withdrawn*)

**0099-87-U:** Amalgamated Clothing & Textile Workers Union (Complainant) v. Genesta Manufacturing Limited, and Hematite Manufacturing Limited (Respondent) (*Withdrawn*)

**0275-87-U:** Sean Mallen, Tom Mallen, Dan Gendreau (Complainants) v. International Brotherhood of Painters & Allied Trades, Local 1494 (Respondent) (*Dismissed*)

**0319-87-U:** Joseph C. Grogan, OPSEU Local 562 (Complainant) v. John Huot, President of OPSEU Local 562 (Respondent) (*Withdrawn*)

**0320-87-U:** Joseph C. Grogan, OPSEU 562 (Complainant) v. James Clancy, President and OPSEU (Respondents) (*Withdrawn*)

**0325-87-U:** Labourers' International Union of North America, Local 607 (Complainant) v. Underground Services Limited (Respondent) (*Withdrawn*)

**0337-87-U:** International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. Scarboro Public House (Respondent) (*Withdrawn*)

**0445-87-U:** Jean Liebman (Complainant) v. York University Staff Association, and York University (Respondents) (*Dismissed*)

**0546-87-U:** United Rubber, Cork, Linoleum & Plastic Workers of America, Local 994 (Complainant) v. The Great Canadian Soup Co. Ltd. (formerly 689499 Ontario Inc.) (Respondent) (*Withdrawn*)

**0628-87-U:** Joseph Paul Drisdelle (Complainant) v. The Municipality of Metropolitan Toronto (Respondent) v. CUPE, Local 43 (Intervener) (*Dismissed*)

**0813-87-U:** Amalgamated Clothing & Textile Workers Union (Complainant) v. Silcofab Limited, division of Robco Inc. (Respondent) (*Withdrawn*)

**0825-87-U:** Graphic Communications International Union, Local 588 (Complainant) v. Love Printing Service Ltd. (Respondent) (*Withdrawn*)

**0870-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. ABC Taxi (Brockville) Ltd. and Safedrive Inc., c.o.b. as City Cab (Respondent) (*Withdrawn*)

**0934-87-U:** Gary Gilmore, et al. (Complainants) v. Teamsters Local Union 230 (Respondent) (*Withdrawn*)

**0950-87-U:** Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 91 (Complainant) v. Office Equipment Company of Canada, F.T.A. Scholefield, and Howard A. Levitt (Respondents) (*Withdrawn*)

**0961-87-U:** United Food & Commercial Workers International Union (Complainant) v. J. B. Food Industries Inc. (Respondent) (*Withdrawn*)

**0972-87-U:** Margaret Page (Complainant) v. URW, Local 189, and Goodyear Canada Inc. (Respondents) (*Withdrawn*)

**1008-87-U:** United Food & Commercial Workers' International Union, Local 175 & 633 (Complainants) v. Beauchesne Bros. Limited (Respondent) (*Withdrawn*)

**1048-87-U:** Canadian Union of Public Employees (Complainant) v. Independent Living Services for Thunder Bay Inc., division of Handicapped Action Group Inc.) (*Withdrawn*)

**1078-87-U:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Complainant) v. Collingwood Plumbing Limited (Respondent) (*Withdrawn*)

**1079-87-U:** Ontario Public Service Employees Union, Local 420 (Complainant) v. Loyalist College of Applied Arts & Technology (Respondent) (*Withdrawn*)

**1081-87-U:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. East-West Construction Company Limited (Respondent) (*Withdrawn*)

**1097-87-U:** Rheel E. Charette (Complainant) v. Roland Bernard, President Local 8979 (Respondent) (*Withdrawn*)

**1099-87-U:** Newton Fitzgerald (Complainant) v. Lamarri Masonry Ltd. (Respondent) (*Dismissed*)

**1100-87-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Donegan's Haulage Ltd., and Ready Mix (Respondents) (*Withdrawn*)

**1109-87-U:** Pavaco Plastics Inc. (Complainant) v. Amalgamated Clothing & Textile Workers Union (Respondent) (*Withdrawn*)

**1112-87-U:** Teodor Duonc (Complainant) v. Teamster Union, Local 879 (Respondent) (*Withdrawn*)

**1114-87-U:** Robert Shody (Complainant) v. United Steelworkers of America, Local 6662 (Respondent) (*Withdrawn*)

**1118-87-U:** Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Lake Erie Foods Inc. (Respondent) (*Withdrawn*)

**1141-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Executive Taxi & Limousine (Respondent) (*Withdrawn*)

**1149-87-U:** Ray Joseph Buttineau Sr. (Complainant) v. Jack Porter (Respondent) (*Dismissed*)

**1195-87-U:** International Brotherhood of Painters & Allied Trades, Local 1824 (Complainant) v. Mike McMahon's Painting & Decorating Limited (Respondent) (*Withdrawn*)

**1213-87-U:** Christian Labour Association of Canada (Complainant) v. Wimbledon Investments Ltd., c.o.b. as Sincoe Terrace (Respondent) (*Withdrawn*)

**1245-87-U:** Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Executive Taxi & Limousine (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0803-87-M:** Wilson's Truck Lines Limited (Employer) and The Canadian Union of Drivers & General Workers (Trade Union) (*Granted*)

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**1342-86-M:** Ontario Public Service Employees Union (Applicant) v. Kawartha Haliburton Children's Aid Society (Respondent) (*Granted*)

**3122-86-M:** Canadian Federation of Students (Applicant) v. The Canadian Union of Public Employees, Local 1281 (Respondent) (*Granted*)

**0588-87-M:** Ontario Nurses' Association (Applicant) v. Metro Windsor-Essex County Health Unit (Respondent) (*Withdrawn*)

**0661-87-M:** Southern Ontario Newspaper Guild, Local 87 (Applicant) v. Metroland, Publishing & Distributing, division of Harlequin Enterprises Ltd. (Respondent) (*Withdrawn*)

**0766-87-M:** Extendicare Sudbury/York Nursing Home (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

**2683-86-OH:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, and John Ceasaroni (Complainants) v. Robert B. Sommerville Company Limited (Respondent) (*Withdrawn*)

**3014-86-OH:** Wayne Jolicoeur (Complainant) v. The Algoma Steel Corporation Limited (Respondent) (*Dismissed*)

**0528-87-OH:** Joseph Paul Drisdelle (Complainant) v. The Municipality of Metropolitan Toronto (Respondent) v. CUPE, Local 43 (Intervener) (*Dismissed*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**1923-86-M:** The Electrical Power Systems Construction Association (Applicant) v. International Association of Bridge, Structural & Ornamental Iron Workers (Respondent) (*Dismissed*)

**2313-86-M:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Optimum Contracting Limited, and Lap-Ron Construction Limited (Respondents) (*Withdrawn*)

**2682-86-M:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of The United States & Canada, Local 46 (Applicant) v. Robert B. Sommerville Company Limited (Respondent) (*Withdrawn*)

**0138-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 83 (Applicant) v. Gareth Brash Contracting (Respondent) (*Granted*)

**0436-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Collingwood Plumbing Ltd. (Respondent) (*Withdrawn*)

**0459-87-G:** International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. 601758 Ontario Inc., c.o.b. as Blandford Insulation 1984 (Respondent) (*Granted*)

**0558-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Canron Limited (Respondent) (*Withdrawn*)

**0559-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. 141527 Canada Inc., c.o.b. as Geracon Drywall (Respondent) (*Granted*)

**0722-87-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Pitts Engineering Construction Limited (Respondent) (*Withdrawn*)

**0831-87-G:** Sheet Metal Workers' International Association, Local 47 (Applicant) v. Raymar Mechanical Ltd., and J.P. Clarke Mechanical Limited (Respondents) (*Withdrawn*)

**0996-87-G:** Labourers' International Union of North America, Local 1036 (Applicant) v. P. B. Rombough (Respondent) (*Withdrawn*)

**1002-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. The Mechanical Contractors of Cobourg Ltd. (Respondent) (*Withdrawn*)

**1019-87-G:** Sheet Metal Workers' International Association, Local 504 (Applicant) v. Ardco Sheet Metal Limited (Respondent) (*Granted*)

**1058-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Great Gulf Homes/Sahara Holdings Inc., and Toronto Housing Labour Bureau (Respondents) (*Granted*)

**1063-87-G; 1064-87-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Krest Masonry Contractors Limited (Respondent) (*Withdrawn*)

**1065-87-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Skyline Construction Masonry Limited (Respondent) (*Withdrawn*)

**1066-87-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Select Masonry Limited (Respondent) (*Withdrawn*)

**1067-87-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. B & M Masonry (Respondent) (*Withdrawn*)

**1068-87-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Eldorado Masonry Limited (Respondent) (*Withdrawn*)

**1069-87-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Medi Group Masonry Ltd. (Respondent) (*Withdrawn*)

**1071-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Bridgewood Plumbing Ltd. (Respondent) (*Withdrawn*)

**1075-87-G:** United Steelworkers of America (Applicant) v. 359087 Ontario Limited, c.o.b. as Wawa Motor Hotel (Respondent) (*Dismissed*)

**1076-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. The Mechanical Contractors of Cobourg Ltd., and 313534 Ontario Ltd., c.o.b. as Vout Welding & Fabricating Limited (Respondents) (*Withdrawn*)

**1125-87-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Youngford Electric Co. (Respondent) (*Withdrawn*)

**1142-87-G:** Labourers' International Union of North America, Local 837 (Applicant) v. Traugot Construction (Respondent) (*Withdrawn*)

**1144-87-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Robert Edwards Electrical Services (Respondent) (*Withdrawn*)

**1145-87-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Zic Electric Ltd. (Respondent) (*Withdrawn*)

**1147-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Nap-Mon Construction Ltd. (Respondent) (*Withdrawn*)

**1162-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Tru-Pac Paving (Respondent) (*Withdrawn*)

**1164-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. L.J.S. Construction Ltd. (Respondent) (*Withdrawn*)

**1166-87-G:** The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 7 (Applicant) v. Universal Ceramics Ltd. (Respondent) (*Withdrawn*)

- 1167-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Drycoustics (Respondent) (*Withdrawn*)
- 1173-87-G:** Ontario Hydro (Applicant) v. Electrical Power Systems Construction Association, and its member Ontario Hydro (Respondents) (*Withdrawn*)
- 1188-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Yustin Interiors Limited (Respondent) (*Withdrawn*)
- 1190-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Robertson-Yates Corporation Ltd. (Respondent) (*Withdrawn*)
- 1199-87-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Victory Plumbing Inc. (Respondent) (*Withdrawn*)
- 1216-87-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Maple Terrazzo, Marble & Tile Inc. (Respondent) (*Granted*)
- 1220-87-G:** Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Division Construction (Respondent) (*Withdrawn*)
- 1221-87-G:** Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America, (Applicant) v. DMD Drywall (Respondent) (*Withdrawn*)
- 1233-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Batt Holdings Ltd. (Respondent) (*Withdrawn*)
- 1234-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Lincoln Carpentry (Respondent) (*Withdrawn*)
- 1235-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Casimir Holdings Ltd. (Respondent) (*Withdrawn*)
- 1236-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Petermar Carpentry Ltd. (Respondent) (*Withdrawn*)
- 1247-87-G:** Millwright District Council of Ontario on its behalf, and on behalf of its Local 2309 (Applicant) v. Urban Erection, division of 471330 Ontario Limited (Respondent) (*Granted*)
- 1262-87-G:** Sheet Metal Workers' International Association, Local 269 (Applicant) v. 662833 Ontario Ltd., c.o.b. as Sidney Sheet Metal (Respondent) (*Granted*)
- 1266-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Flag Construction Company Ltd. (Respondent) (*Withdrawn*)
- 1267-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Kecman Enterprises Inc. (Respondent) (*Granted*)
- 1305-87-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. C & D Plastering Limited and/or C & D Limited (Respondents) (*Withdrawn*)
- 1325-87-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Bramalea Iron Works Limited (Respondent) (*Withdrawn*)
- 1345-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Baywood Carpentry Ltd. (Respondent) (*Withdrawn*)

**1348-87-G:** Labourers' International Union of North America, Local 183 (Applicant) v. York Framing (Respondent) (*Withdrawn*)



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